

91-1526

(1)

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

JOHN H. WESTON*
CATHY E. CROSSON
G. RANDALL GARROU
CLYDE F. DEWITT
WESTON, SARNO, GARROU & DEWITT
433 N. Camden Drive, Suite 900
Beverly Hills, California 90210
(310) 550-7460

Attorneys for Petitioner

**Counsel of Record*

QUESTIONS PRESENTED

- 1) Does RICO forfeiture constitute a prior restraint of the kind condemned in *Near v. Minnesota*, or otherwise violate the First Amendment, when applied to close a \$25 million chain of bookstores, video stores, and theaters, to confiscate all their property including five years' proceeds, and to burn their inventories, solely on the basis of seven obscene videotapes and magazines?
- 2) Does the forfeiture of a \$25 million media business along with a six-year prison term and fines in excess of \$200,000, all as punishment for seven obscene videotapes and magazines, violate the Eighth Amendment?

LIST OF PARTIES

Petitioner Ferris J. Alexander, Sr. and the United States of America as Respondent are the only parties to this action. Former Attorney General Richard Thornburgh, named in his official capacity as defendant in the civil case consolidated below with this one on appeal, was not a named party in the criminal case, *United States v. Alexander*, wherein Petitioner now seeks this Court's review. Petitioner has separately notified this Court of his belief that his co-defendants in the criminal trial below (Delores Alexander and Jeffrey Alexander, who were acquitted, and Wanda Magnuson), who did not pursue this matter on appeal, no longer have an interest in the outcome of this proceeding.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved...	2
Statement of the Case	2
REASONS FOR GRANTING THE WRIT	8
I. MASSIVE FORFEITURES OF COMMUNICATIVE BUSINESSES FOR OBSCENITY OFFENSES ARE PROFOUNDLY AT ODDS WITH FIRST AMENDMENT DOCTRINE AS CONSISTENTLY APPLIED BY THIS COURT AND THE LOWER COURTS	14
A. In Holding That Obscenity Violations Justify Blanket Forfeitures of Expressive Businesses, the Court of Appeals' Decision Conflicts with This Court's Prior Decisions in <i>Near v. Minnesota</i> and Numerous Other Cases Proscribing Such Remedies for Speech-Related Offenses.....	15
B. The Eighth Circuit's Decision Upholding RICO Forfeiture Also Conflicts With Decisions of Numerous Other Circuits, and of Innumerable State Courts, Striking Down Indistinguishable Remedies for Obscenity Violations	21

TABLE OF CONTENTS - Continued

	Page
II. THE FORFEITURE OF A \$25 MILLION BUSINESS, IN ADDITION TO A SIX-YEAR PRISON TERM AND \$200,000 IN FINES, IS GROSSLY DISPROPORTIONATE PUNISHMENT FOR DISTRIBUTING SEVEN OBSCENE ITEMS, AND THE COURT OF APPEALS' SUMMARY REJECTION OF PETITIONER'S EIGHTH AMENDMENT CHALLENGE DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE NINTH, TENTH, AND SEVENTH CIRCUITS	26
Conclusion	30

APPENDIX

Appendix A: <i>Alexander v. Thornburgh</i> , 943 F.2d 825 (8th Cir. 1991).....	App. 1
Appendix B: <i>United States v. Alexander</i> , 736 F. Supp. 968 (D. Minn. 1990).....	App. 27
Appendix C: Judgment and Forfeiture Orders of the United States District Court for the District of Minnesota.....	App. 125
Appendix D: Order of the Eighth Court of Appeals denying Petition for Rehearing and Suggestion for Rehearing En Banc...	App. 163
Appendix E: Constitutional and Statutory Provisions.....	App. 164

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Alexander v. Thornburgh</i> , 943 F.2d 825 (8th Cir. 1991).....	<i>passim</i>
<i>American Library Association v. Barr</i> , ___ F.2d ___, 1992 WL 27165 (Fed. Cir. 1992)	12
<i>Avon 42nd Street Corp. v. Myerson</i> , 352 F. Supp. 994 (S.D.N.Y. 1972)	22-23
<i>Bayside Enterprises, Inc. v. Carson</i> , 470 F. Supp. 1140 (M.D. Fla. 1979)	22
<i>Chulchian v. City of Indianapolis</i> , 477 F. Supp. 128 (S.D. Ind. 1979)	23
<i>City of Paducah v. Investment Entertainment</i> , 791 F.2d 463 (6th Cir. 1986)	22
<i>Cornflower Entertainment, Inc. v. Salt Lake City Corp.</i> , 485 F. Supp. 777 (D. Utah 1980)	22
<i>Entertainment Concepts Inc. III v. Maciejewski</i> , 631 F.2d 497 (7th Cir. 1980)	22, 23
<i>Fernandes v. Limmer</i> , 663 F.2d 619 (5th Cir. 1981)	23
<i>Fort Wayne Books, Inc. v. Indiana</i> , 489 U.S. 46 (1989)	<i>passim</i>
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990)	9
<i>Gayety Theaters, Inc. v. City of Miami</i> , 719 F.2d 1550 (11th Cir. 1983)	22, 23
<i>Genusa v. City of Peoria</i> , 475 F. Supp. 1199 (C.D. Ill. 1979)	22
<i>Harmelin v. Michigan</i> , ___ U.S. ___, 111 S. Ct. 2680 (1991)	28

TABLE OF AUTHORITIES – Continued

	Page
<i>Huffman v. Pursue, Ltd.</i> , 420 U.S. 592 (1975)	22
<i>International Society for Krishna Consciousness v. Eaves</i> , 601 F.2d 809 (5th Cir. 1979)	23
<i>Jenkins v. Georgia</i> , 418 U.S. 153 (1974)	10
<i>J-R Distributors v. Eikenberry</i> , 725 F.2d 482 (1984), rev'd. on other grounds sub nom. <i>Brockett v. Spokane Arcades</i> , 472 U.S. 491 (1985).....	11, 24, 25
<i>Marks v. City of Newport Ky.</i> , 344 F. Supp. 675 (E.D. Ky. 1972).....	23
<i>Members of City Council of the City of Los Angeles v. Taxpayers For Vincent</i> , 466 U.S. 789 (1984)	14
<i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241 (1974)	9
<i>Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue</i> , 460 U.S. 575 (1983).....	8, 17, 19
<i>Natco Theatres Inc. v. Ratner</i> , 463 F. Supp. 1124 (S.D.N.Y. 1979)	22
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	passim
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	14, 16, 30
<i>Nihiser v. Sendak</i> , 405 F. Supp. 482 (N.D.Ind. 1974)	22
<i>Oregon Bookmark Corp. v. Schrunk</i> , 321 F. Supp. 639 (D.Oregon 1970).....	23
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971).....	20
<i>Pollitt v. Connick</i> , 596 F. Supp. 261 (E.D. La. 1984)	22
<i>Polykoff v. Collins</i> , 816 F.2d 1326 (9th Cir. 1987).....	24

TABLE OF AUTHORITIES – Continued

	Page
<i>Robinson v. California</i> , 370 U.S. 660 (1962).....	27
<i>San Juan Liquors v. Consol. City of Jacksonville</i> , 480 F. Supp. 151 (M.D. Fla. 1979)	22
<i>Simon & Schuster v. New York Crime Victims Board</i> , — U.S. —, 112 S. Ct. 501 (1991)	11, 17, 18, 19
<i>Smith v. California</i> , 361 U.S. 147 (1959)	14
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	27, 28
<i>Speight v. Slaton</i> , 415 U.S. 333 (1974)	22
<i>United States v. Alexander</i> , 736 F. Supp. 968 (D. Minn. 1990)	1, 5, 6, 7
<i>United States v. Angiulo</i> , 897 F.2d 1169 (1st Cir. 1990).....	28
<i>United States v. Busher</i> , 817 F.2d 1409 (9th Cir. 1987)	27, 28, 29
<i>United States v. California Publishers Liquidating Corporation</i> , 778 F. Supp. 1377 (N.D. Tex. 1991)	12
<i>United States v. Harris</i> , 903 F.2d 770 (10th Cir. 1990) .	27, 28
<i>United States v. Pryba</i> , 900 F.2d 748 (4th Cir. 1989)	7, 21, 28
<i>United States v. Robinson</i> , 721 F. Supp. 1541 (D.R.I. 1989).....	28
<i>United States v. Vriner</i> , 921 F.2d 710 (7th Cir. 1991) .	27, 28
<i>Universal Amusement Co., Inc. v. Vance</i> , 587 F.2d 159 (5th Cir. 1978).....	21, 23
<i>Vance v. Universal Amusement Co.</i> , 445 U.S. 308 (1980)	21

TABLE OF AUTHORITIES - Continued

	Page
<i>Whitney v. California</i> , 274 U.S. 357 (1927)	8
<i>Yuclan Enterprises Inc. v. Arre</i> , 488 F. Supp. 820 (D. Hawaii 1980)	22
STATE CASES	
<i>Alexander v. City of St. Paul</i> , 303 Minn. 201, 227 N.W.2d. 370 (Minn. 1975)	23
<i>City of Delevan v. Thomas</i> , 31 Ill. App.3d 630, 334 N.E.2d 190, (1975)	23
<i>City of Minot v. Central Ave. News, Inc.</i> , 308 N.W. 2d 851 (N.D. 1981)	22
<i>City of Seattle v. Bittner</i> , 81 Wash.2d 747, 505 P.2d 126 (1973)	23
<i>Commonwealth ex rel. Davis v. Van Emberg</i> , 347 A.2d 712 (Penn. 1975)	22
<i>Giarrusso v. D'Iberville Gallery</i> , 295 So.2d 891 (La. App. 1974)	22
<i>General Corp. v. Sweeton</i> , 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976)	22
<i>Gulf States Theaters of Louisiana v. Richardson</i> , 287 So.2d 480 (La. 1974)	22
<i>Hamar Theatres Inc. v. City of Newark</i> , 150 N.J. Super. 14, 374 A.2d 502 (1977)	23
<i>Kansas v. A Motion Picture Entitled "The Bet,"</i> 219 Kan. 64, 547 P.2d 760 (1976)	22
<i>Kahns v. Santa Cruz Co. Bd. of Sup'rs.</i> , 128 Cal. App. 3d 369, 181 Cal. Rptr. 1 (1982)	23
<i>Mitchem v. State ex rel. Schaub</i> , 250 So.2d 883 (Fla. 1971)	22

TABLE OF AUTHORITIES - Continued

	Page
<i>New Riveria Arts Theatre v. Davis</i> , 219 Tenn. 652, 412 S.W.2d 890 (1967)	22
<i>Parish of Jefferson v. Bayou Landing Ltd., Inc.</i> , 350 So. 2d 158 (La.1977)	22
<i>People ex rel. Busch v. Projection Room Theater</i> , 17 Cal.3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), cert. den. 429 U.S. 922 (1976)	22
<i>People v. J.W. Productions</i> , 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979)	23
<i>Perrine v. Municipal Court</i> , 5 Cal.3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972)	23
<i>Sanders v. State</i> , 231 Ga. 608, 203 S.E.2d 153 (1974)	22, 23
<i>Society to Oppose Pornography, Inc. v. Thevis</i> , 255 So.2d 876 (La. App. 1972)	22
<i>State ex rel. Blee v. Mohny Enterprises</i> , 289 N.E.2d 519 (Ind. App. 1972)	22
<i>State ex rel. Ewing v. "Without a Stitch"</i> , 307 N.E.2d 911 (Ohio 1974)	22
<i>State ex rel. Field v. Hess</i> , 540 P.2d 1165 (Okla. 1975)	22
<i>State v. Bauer</i> , 159 Ariz. 443, 768 P.2d 1785 (Ariz. App. 1990)	11, 23
<i>State v. Feld</i> , 157 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987)	11, 13, 24
CONSTITUTIONAL PROVISIONS	
United States Constitution	
First Amendment	<i>passim</i>
Eighth Amendment	7, 26-29

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

United States Code

18 U.S.C. § 1465.....	2, 6
18 U.S.C. § 1466.....	2, 6
18 U.S.C. § 1467.....	12
18 U.S.C. § 1963(a)	<i>passim</i>

STATE STATUTES

Ariz. Rev. Stat. Ann.

§ 13-2301 et seq.....	13
-----------------------	----

Colo. Rev. Stat. Ann.

§ 18-17-103(5)(b)(VI)	13
§ 18-17-105(1)(b).....	13
§ 18-17-106(2).....	13

Conn. Gen. Stat.

§ 53-394.....	13
§ 53-397.....	13

Del. Code

§ 1502(9)(a)(7)	13
§ 1504(b)	13
§ 1505(b)	13

TABLE OF AUTHORITIES – Continued

Page

Fla. Stat. Ann.

§ 895.02(1)(a)(29)	13
§ 895.05(2)(a)	13

Ga. Code Ann.

§ 16-14-3(9)(A)(xii).....	13
§ 16-14-6(a)(5)	13
§ 16-14-7(a).....	13

Idaho Stat. Ann.

§ 18-7803(a)(8).....	13
§ 18-7804(f).....	13

Ill. Stat. Rev. ch. 38, ¶ 11-20..... 13

Ind. Code Ann.

§ 34-45-6-1(2)(4)	13
§ 34-4-30.5-3.....	13

Nev. Rev. Stat.

§ 207.420	13
§ 207.460	13

N.J. Stat. Ann.

§ 2C:41-1(e)	13
§ 2C:41-3.....	13
§ 2C:41-4(a)(9).....	13

TABLE OF AUTHORITIES – Continued

	Page
N.C. Gen. Stat.	
75-D-3(c)(2).....	13
§ 75-8	13
Okl. St. Ann.	
§ 1402(10)(v)	13
§ 1405(A).....	13
Wash. Stat. Ann.	
§ 9A.82.010(14)(s).....	13
§ 9A.82.100(4)(f)	13
Wis. Stat. Ann.	
§ 946.82(4).....	13
§ 946.86(1).....	13
§ 946.87(2)(a)	13

MISCELLANEOUS AUTHORITIES

Attorney General's Commission on Pornography, <i>Final Report</i> 464 (1986).....	4
<i>Denver Post</i> , November 4, 1990.....	4
J.R. Green, <i>A Short History of the English People</i> (1874)	26

No. _____

In The

Supreme Court of the United States

October Term, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition For A Writ Of Certiorari
 To The United States Court Of Appeals
 For The Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991), and is reproduced as Appendix A to this Petition. The Court of Appeals' unreported order denying rehearing and rehearing en banc appears as Appendix D. The district court's reported opinion deciding the forfeiture issue, *United States v. Alexander*, 736 F. Supp. 968 (D. Minn. 1990), is reproduced as Appendix B; its unreported sentencing judgment and forfeiture orders are reproduced as Appendix C.

JURISDICTION

The United States Court of Appeals, Eighth Circuit, entered its opinion in this case on August 30, 1991, and

denied Petitioner's motion for rehearing on October 30, 1991. Petitioner has filed this petition within the extension this Court granted him, until March 16, 1992. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are reproduced at Appendix E:

United States Constitution, amendment I

United States Constitution, amendment VIII

United States Code:

18 U.S.C. § 1465

18 U.S.C. § 1466

18 U.S.C. § 1961(1)(B)

18 U.S.C. § 1962(a), (c)-(d)

18 U.S.C. § 1963(a).

STATEMENT OF THE CASE

This case presents the long-simmering issue which this Court in *Fort Wayne Books v. Indiana* concluded was unripe but recognized to be vitally important: whether on the basis of past speech subsequently determined to have been obscene, the government may confiscate and destroy an entire communicative business, including its large inventory of protected materials. The issue is unquestionably ripe in this case, where the government has obtained a final forfeiture order, and has closed virtually every adult bookstore in the Minneapolis/St. Paul area.

The Court of Appeals' decision below, sustaining blanket RICO forfeitures in obscenity cases, creates a dramatic split of authority in its conflict with decisions of the Fifth, Sixth, Ninth and Eleventh Circuits, and numerous state courts of last resort, all of which have invalidated legally indistinguishable remedies for obscenity violations.

Solely because Petitioner distributed seven magazines and videotapes determined at trial to be obscene,¹ the government has seized and closed his entire chain of thirteen bookstores, theaters, and video stores formerly engaged in disseminating officially-disfavored, albeit First Amendment-protected, erotic speech. In addition to confiscating all the related real and personal property and bank accounts, government has now *burned* these businesses' entire inventory consisting of over one hundred thousand books, magazines, and videotapes.

For over thirty years, Petitioner Ferris Alexander operated a chain of retail bookstores, theaters and video stores in the Minneapolis area;² he also conducted a wholesale book, magazine, and videotape business. Largely but not exclusively devoted to erotic materials, these businesses were notably successful: the government alleged that their annual revenues exceeded \$5 million.

In addition to the enormous local popularity of the erotic materials his businesses offered for sale and rental, Petitioner reasonably believed that they were well within the community standards of the Twin Cities area. Local officials had not prosecuted him for obscenity since the mid-1970s, when he was acquitted. Following several such acquittals and dismissals of obscenity charges against him, Minnesota officials announced they would no longer prosecute for obscenity unless the materials involved bestiality or children, materials which Petitioner's business did not sell. To Petitioner's knowledge,

¹ Prior to this indictment, the Petitioner had received no notice, much less any judicial determination, that either the federal government or local authorities considered the materials obscene. Nor did the indictment allege any prior convictions.

² Operating primarily in the Twin Cities area, Petitioner also operated businesses in Duluth and Rochester.

there had been no federal obscenity cases in the district since his earlier acquittal.³

In 1989, however, the government indicted Petitioner as part of its wide-ranging campaign to eliminate sexually-explicit materials from the marketplace. Under the aegis of the Justice Department's fledgling but ever-expanding National Obscenity Enforcement Unit, the government aggressively sought to destroy businesses engaged in erotic speech, an objective it touted publicly.⁴ Apparently because the Petitioner conducted a highly visible chain of businesses which dominated the Minneapolis market, the government targeted his "enterprise" for RICO forfeiture.

In May 1989, Alexander was charged under a 41-count federal indictment with obscenity, RICO, and

³ A mail order obscenity indictment was returned in Duluth shortly before Petitioner's indictment.

⁴ The Meese Commission had touted RICO forfeiture as a necessary means to "efficiently suppress the evils of obscenity." Complaining that ordinary obscenity prosecutions are not adequate to the task of stemming the tide of the American public's enthusiastic and growing consumption of adult entertainment, the Meese Commission expressly advocated blanket forfeitures for obscenity offenses as "an effective means to substantially eliminate" businesses that disseminate erotica. Attorney General's Commission on Pornography, *Final Report* 464 (1986). This strategy soon became Justice Department policy.

As head of the Justice Department's Obscenity Unit, Patrick Trueman expressed the government's wide-ranging designs to suppress erotic expression:

"To Trueman, whose squad has . . . helped put a half-dozen major producers and distributors . . . out of business, the neighborhood video store is the next likely target.

" 'We'll prosecute the video store owner as well as the producer and distributor,' Trueman said. 'You'll see that . . . as we announce more and more indictments.' " *Denver Post*, November 4, 1990.

various tax violations.⁵ As the sole basis for the RICO charges and attendant forfeiture allegations, the indictment charged him with 34 obscenity counts, alleging that five magazines and seven videotapes his businesses had sold were obscene.⁶

United States Magistrate Janice Symchych sustained Petitioner's pre-trial challenge to RICO and held the forfeiture provisions of 18 U.S.C. § 1963 facially unconstitutional for overbreadth, because they authorize the wholesale forfeiture of expressive businesses without regard for the censorial consequences thus visited upon protected speech. *United States v. Alexander*, 736 F. Supp. at 986-987. (App. 72-74.) Citing the numerous federal decisions striking down padlocking orders and license revocations as overly broad penalties for obscenity convictions, the magistrate also concluded that RICO forfeitures operate as an impermissible prior restraint. 736 F. Supp. at 989-991. (App. 78-81.) She therefore recommended that the trial court hold RICO forfeiture facially unconstitutional as a prior restraint. *Id.* at 981, 988, 990. (App. 58, 81, 119.)

⁵ Petitioner was convicted of four tax violations. The tax charges are immaterial to the issues Petitioner now raises, however, as they were not predicate offenses for the RICO counts, predicated solely on the alleged obscenity offenses.

⁶ This federal indictment alleged that Petitioner's materials violated community standards in a community where there had been: 1) no federal prosecutions of such over-the-counter, publicly prominent X-rated businesses since Petitioner was acquitted in the mid-1970s; 2) no local obscenity prosecutions against Petitioner's businesses in memory; and 3) no prosecutions at all for materials even remotely similar. Thus despite Petitioner's long-time status as a prominent state-wide media fixture, and with no notice of its change of position, the federal government targeted him for elimination in 1987. Ironically, several of the previously unprosecuted violations occurred as early as 1984 and 1985.

The district court, however, sustained the government's objection to this recommendation, and held that the RICO forfeiture remedy was neither overbroad nor a prior restraint, on grounds that the First Amendment imposes no limitation whatsoever upon the remedies the government may impose for obscenity offenses. 736 F. Supp. at 978-980. (App. 51-55.) The trial court deemed the First Amendment irrelevant, because "the law . . . treats an obscenity charge the same as any other criminal charge, be it bank robbery, narcotics trafficking, or firearms violations." *Id.* at 980. (App. 55.)

The court also discerned in the impending wholesale forfeiture of Petitioner's bookstores, theaters, and video stores "no necessary impact on expressive activity in the future." *Id.* (App. 54.) In fact, these forfeitures closed virtually every erotica outlet in the Twin Cities area.

Following a three-month jury trial, Petitioner was acquitted on 16 counts of obscenity, and convicted of 18 obscenity violations (involving a total of only seven items) which were the sole predicates for three RICO convictions.⁷ (App. 127.) In its sentencing order, the trial court assessed Mr. Alexander well over \$200,000 in fines and costs,⁸ and sentenced him to concurrent terms of 36 to 72 months. (App. 127-128, 132, 133, 162.) The 73-year-old Petitioner is currently serving this six-year prison sentence, which he does not ask this Court to review.

⁷ Specifically, the Petitioner was convicted of twelve counts of transporting obscene material in interstate commerce under 18 U.S.C. § 1465, and six counts of engaging in the business of selling or transferring obscene material under 18 U.S.C. § 1466.

⁸ The court imposed a fine of \$100,000 and a special assessment of \$950 (App. 132), approximately another \$100,000 in costs of his incarceration and supervised release (App. 133), and costs of prosecution in the amount of \$29,737.84. (App. 162.) In ordering Petitioner to pay the costs of prosecution, the court dismissed the fact that it was dismantling an entire chain of communicative businesses with: "Defendant created his criminal empire and now must pay for its destruction." (App. 162.)

In addition, however, although only seven items were found obscene, § 1963 of the RICO Act **required** that the district court order forfeiture of the entire chain of thirteen retail bookstores and video stores, along with his wholesale media distribution business. The forfeiture order encompassed all assets associated with these expressive businesses, including the ten parcels of real property which had housed them, their bank accounts, three company vehicles (two vans and a trailer), as well as \$8.9 million in estimated proceeds from the operation of these communicative businesses for the years 1985 through 1988. (App. 135-147.) The court also ordered forfeiture of all personal property, including:

"all 8mm projectors, television monitors . . . , video cassette tape players, video cassettes, magazines, other printed material, shelving and display material, . . . and other inventory." (App. 144.)

Accordingly, the government confiscated (and subsequently destroyed) these businesses' inventories of over one hundred thousand unlitigated, presumptively protected books, magazines, and videotapes, simply because seven items on other shelves were found unprotected.

The Eighth Circuit affirmed Petitioner's conviction, rejecting his arguments that RICO forfeiture of an entire expressive business for obscenity offenses violated the First and Eighth Amendments. (App. 21-25.) Relying entirely upon the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 305 (1990), the court concluded First Amendment analysis was simply irrelevant. *Alexander v. Thornburgh*, 943 F.2d 825, 834-835. (App. 21, 23.) The court apparently also adopted the Fourth Circuit's conclusion in *Pryba* that it need not review this sentence under the Eighth Amendment. *Id.* at 835-836. (App. 25.)

In October 1991, before the Court of Appeals had even acted on the Petitioner's rehearing petitions, the government destroyed the entire seized inventory of First

Amendment-protected materials from his wholesale distribution business, bookstores, and video stores. The federal marshal's office in Minneapolis trucked three tons of magazines, videotapes, and other inventory to a garbage processing plant in Elk River, Minnesota, where the magazines were burned and the videotapes destroyed by crushing.⁹

REASONS FOR GRANTING THE WRIT

This case squarely and dramatically presents the issue of RICO forfeitures of entire media businesses for numerically insignificant obscenity violations. In upholding such forfeitures, the decision below would destroy the central guarantee of the First Amendment: that government cannot punish a disfavored speaker by stifling future, presumptively protected speech, nor suppress a book because another was found unlawful.

This Court recognized the importance of this issue in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), which was briefed and argued by Petitioner's present counsel. In *Fort Wayne Books*, this Court invalidated pre-trial seizures of expressive businesses in RICO/obscenity cases, but deferred consideration of First Amendment challenges to post-conviction forfeitures under the Indiana RICO statute. The Court concluded the issue was not ripe, where the state had not yet invoked such forfeiture remedies.¹⁰ At the same time, this Court noted the importance of these issues, particularly because then as now,

⁹ See *Minneapolis Star Tribune*, October 19, 1991 at 1B. These methods of destruction are particularly apt given the fate of "witches" in 17th century Salem, Massachusetts. "Men feared witches and burnt women," as Justice Brandeis wrote in *Whitney v. California*, 274 U.S. 357, 376 (1927). "Witches" were also put to death by crushing them under progressively heavier weights of stone.

¹⁰ "[W]e do not reach the question of the constitutionality of post-trial forfeiture . . . in this context. The case before us does not involve such a forfeiture." 489 U.S. at 65 n. 11.

"Petitioner's challenge to the constitutionality of the use of the RICO statutes to criminalize patterns of obscenity offenses calls into question the legitimacy of the law enforcement practices of several States, as well as the Federal Government. Resolution of this important issue . . . should not remain in doubt. 'Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an unsettled and uneasy constitutional posture . . . could only further harm the operation of a free press.'" 489 U.S. 55-56, quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247, n. 6 (1974).

For these reasons, Justice Stevens would also have decided the RICO forfeiture issue in *Fort Wayne Books*; he urged the majority to invalidate post-conviction forfeitures as well as pre-trial seizures. 489 U.S. at 77, 84 (Stevens, J., concurring in part and dissenting in part).¹¹

This case presents a compelling occasion for doing so; it is the paradigm case for which this Court was presumably waiting when it deferred adjudication of the issue in *Fort Wayne Books*. It concretely and non-speculatively presents an actual post-trial judgment which starkly illustrates the constitutional abuses inherent in RICO forfeitures for obscenity offenses. The government has targeted a business engaged in erotic speech, and solely on the basis of the seven items determined to be obscene, it has imposed the RICO Act's ultimate, speech-

¹¹ Similarly, Justice Scalia in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 252-253 (1990) (concurring and dissenting opinion), worried that RICO's "draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography . . . perversely render less effective our efforts, through a restrictive definition of obscenity, to prevent the 'chilling' of socially valuable speech. State RICO penalties for obscenity, for example, intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*."

stifling remedy: blanket forfeiture. By means of such forfeiture, the government has closed down an entire chain of 13 bookstores, theaters, and video stores engaged in erotic speech, to which the government is openly hostile. It has removed from circulation and destroyed those businesses' vast inventories of books, magazines, and videotapes, and has carted them off to be burned.¹²

If upheld, this forfeiture will signal a seismic shift in First Amendment doctrine, authorizing government for the first time to employ whatever remedies it chooses to punish unprotected speech, even if the effect is to broadly preclude future, protected speech. This holding defies the bedrock prohibition against prior restraint this Court announced in *Near v. Minnesota*, 283 U.S. 697 (1931), and opens the door wide to governmental suppression of officially-disfavored speech.

Such a rule fundamentally threatens the security of First Amendment rights in this country. In its most immediate and literal application, this rule would have allowed the state in *Jenkins v. Georgia*, 418 U.S. 153 (1974), to confiscate the entire theater chain or even the Hollywood movie studio once the obscenity conviction for exhibiting the film "Carnal Knowledge" was upheld by the Georgia Supreme Court. The federal government could likewise use that state conviction as a RICO predicate, and if it moved as aggressively as it has against Petitioner in this case, would have already dismantled the theater and movie studio, burning their film libraries before this Court ever had a chance to rectify the error.

The decision below, approving such a forfeiture and clearing the way for the government to burn First

Amendment-protected inventories of media materials, stands in direct conflict with this Court's decisions in *Near v. Minnesota* and its progeny. Under the rule of *Near*, innumerable state and lower federal courts have invalidated such prospectively-censorial remedies for speech-related offenses as per se violations of the First Amendment.

The Court of Appeals could sustain RICO forfeitures for obscenity only because it concluded that First Amendment analysis did not apply at all, flagrantly disregarding this Court's plain holding to the contrary in *Fort Wayne Books*, 489 U.S. at 66. As recently as its decision in *Simon & Schuster v. New York Crime Victims Board*, ___ U.S. ___, 112 S. Ct. 501 (1991), this Court reaffirmed that even where the state seeks to deprive criminals convicted of non-speech offenses of "the fruits of their crime," any such remedy which adversely impacts free speech and press must survive the most searching scrutiny.

The Eighth Circuit's opinion also directly conflicts with decisions of the Fifth, Sixth, and Eleventh Circuits, and numerous state courts, which have all applied the per se *Near* rule against prior restraints to invalidate RICO forfeitures or less severe prospective restraints on expressive businesses for obscenity offenses. The opinion below is most squarely at odds with the Arizona courts' resolution of the issue in *State v. Feld*, 157 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), cert. denied, 485 U.S. 977 (1988), in which the court specifically held that wholesale RICO forfeitures for obscenity violations would constitute a prior restraint, and therefore construed the state RICO Act as limited to forfeiting only the materials judicially determined to be obscene and proceeds from their sale. The Arizona Supreme Court denied review in *Feld* on August 4, 1987, and its rule has been consistently reaffirmed in the Arizona courts. See *State v. Bauer*, 159 Ariz. 443, 768 P.2d 1785 (Ariz. App. 1990).

The decision below also conflicts with the decision of the Ninth Circuit in *J-R Distributors v. Eikenberry*, 725 F.2d 482, 486 (9th Cir. 1984), rev'd. on other grounds sub nom.

¹² That censorship was the government's intended goal is confirmed by its closing these stores and destroying their constitutionally protected inventory. Otherwise the government would have sold them to prospective buyers who would undoubtedly have been eager to acquire and continue to operate these lucrative businesses.

Brockett v. Spokane Arcades, 472 U.S. 491 (1985), in which the court struck down similarly overbroad penalties for obscenity offenses under the First Amendment. Highlighting the necessity for this Court's guidance is the fact that this issue of RICO forfeitures for obscenity is pending in the Ninth Circuit, in *Adult Video Association v. Barr*, (Case No.90-55252, argued May 6, 1991).

A closely related question, whether the potentially similar obscenity forfeiture provisions of 18 U.S.C. § 1467 violate the First Amendment, is pending in the Fifth Circuit.¹³ Very recently in *United States v. California Publishers Liquidating Corporation*, 778 F. Supp. 1377 (N.D. Tex. 1991), the district court refused to order forfeitures under the discretionary provisions of 18 U.S.C. § 1467, and sharply rebuked the government for attempting to invoke such patently unconstitutional remedies:

"Forfeiture under these circumstances of truly de minimis use of the properties for the commission of the [obscenity] offenses simply serves no legitimate end; that is, no end other than destroying legal business enterprises simply because their stock in trade is sexually related materials." 778 F. Supp. at 1389.

"[T]he government's requested forfeiture of Great Western's printing facility is subject to close First Amendment analysis and likely would, if granted, constitute an impermissible

¹³ The importance of the obscenity/forfeiture issue to the major media organizations is demonstrated by the challenge to 18 U.S.C. § 1467 brought by the American Library Association, the American Booksellers Association, the Council for Periodical Distributors Associations, the International Periodical Distributors Association, the Satellite Broadcasting and Communications Associations of America, the Freedom to Read Foundation, the Magazine Publishers of America, the American Society of Magazine Editors, and the American Society of Magazine Photographers, in *American Library Association v. Barr*, ___ F.2d ___, 1992 WL 27165 (Fed. Cir. 1992), in which the court found their First Amendment claims nonjusticiable.

prior restraint of expression under *Near v. Minnesota* and its progeny." *Id.* at 1394.

Obviously, the use of RICO forfeitures in obscenity cases remains a pressing issue of tremendous practical importance, given the many on-going prosecutions under both federal and state RICO and obscenity statutes.¹⁴ In light of events subsequent to the *Fort Wayne Books* decision, particularly given the government's use of RICO's over-reaching remedies in this case to seize and to burn entire inventories of books, periodicals, and videotapes, this question has now gone unresolved for far too long.

¹⁴ In addition to the federal RICO provisions directly at issue here and potentially implicated in the scores of pending federal obscenity cases around the country, at least 15 states have their own RICO or similar provisions prescribing wholesale forfeiture in retribution for obscenity. See Ariz. Rev. Stat. Ann. § 13-2301 et seq. (West Supp. 1991); Colo. Rev. Stat. Ann. § 18-17-103(5)(b)(VI), -105(1)(b), -106(2) (West Supp. 1991); Conn. Gen. Stat. §§ 53-394, 53-397 (Supp. 1991); Del. Code §§ 1502(9)(a)(7), 1504(b), 1505(b) (Supp. 1991); Fla. Stat. Ann. §§ 895.02(1)(a)(29), 895.05(2)(a) (West Supp. 1991); Ga. Code Ann. §§ 16-14-3(9)(A)(xii), 16-14-6(a)(5), 16-14-7(a) (Supp. 1991); Idaho Stat. Ann. §§ 18-7803(a)(8), 18-7804(f) (Supp. 1991); Ill. Stat. Rev. ch. 38, ¶ 11-20 (Smith-Hurd Supp. 1991); Ind. Code Ann. §§ 34-45-6-1(2)(4), 34-4-30.5-3 (West Supp. 1991); Nev. Rev. Stat. §§ 207.420, 207.460 (Michie 1991); N.J. Stat. Ann. §§ 2C:41-1(e), 2C:41-3, 2C:41-4(a)(9) (West Supp. 1991); N.C. Gen. Stat. §§ 75-D-3(c)(2), 75-8 (Supp. 1991); Okl. St. Ann. §§ 1402(10)(v), 1405(A) (1991); Wash. Stat. Ann. §§ 9A.82.010(14)(s), 9A.82.100(4)(f) (1991); Wis. Stat. Ann. §§ 946.82(4), 946.86(1), 946.87(2)(a) (1991). Enforcement of these statutes varies widely, from Arizona where the courts have precluded such forfeitures by means of a limiting interpretation in *State v. Feld*, 745 P.2d 146 (Ariz. App. 1987), to Florida where the state is aggressively seeking forfeitures in obscenity cases.

I. MASSIVE FORFEITURES OF COMMUNICATIVE BUSINESSES FOR OBSCENITY OFFENSES ARE PROFOUNDLY AT ODDS WITH FIRST AMENDMENT DOCTRINE AS CONSISTENTLY APPLIED BY THIS COURT AND THE LOWER COURTS.

The application of the RICO forfeiture remedy to destroy entire expressive businesses is riddled with defects under the First Amendment, whether viewed from the perspective of facial overbreadth,¹⁵ or as creating the pall of self-censorship condemned in *Smith v. California*, 361 U.S. 147 (1959), and *New York Times v. Sullivan*, 376 U.S. 254, 278-279 (1964). Most clearly of all, however, the court below ignored the per se rule against prior restraints this Court announced in *Near v. Minnesota*, which dozens of state and federal courts have applied to strike down similar, if less drastic, prospectively censorial remedies for obscenity violations. Because the decision below is not only grievously in error but has already exacted such an irreparable toll in terms of Petitioner's First Amendment rights and those of the public, this Court's review is urgently required.

Quite simply, if the Court of Appeals' myopic vision of the First Amendment prevails, then all expressive networks are subject to wholesale confiscation for even de minimis errors of judgment. Newspaper chains, publishing houses, television and radio networks, and movie studios will all be chilled by the potentially lethal Sword

¹⁵ Cf. *Members of City Council of the City of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 797-798 (1984), in which this Court noted that such speech-suppressive statutes are

"unconstitutional on their face because . . . any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."

of Damocles this sub silentio overruling of *Near v. Minnesota* would place over their heads for unprotected communicative conduct.

A. In Holding That Obscenity Violations Justify Blanket Forfeitures of Expressive Businesses, the Court of Appeals' Decision Conflicts with This Court's Prior Decisions in *Near v. Minnesota* and Numerous Other Cases Proscribing Such Remedies for Speech-Related Offenses.

In allowing the government to forfeit and destroy media businesses, the court below has ignored this Court's prior decisions. Most fundamentally of all, it erred in concluding that because obscenity is a crime, the First Amendment in no way limits the remedies the government may employ in obscenity cases. This Court's decisions mandate an entirely contrary conclusion: that the First Amendment interposes a per se rule against direct prior restraints upon presumptively protected future expression.

As this case so vividly demonstrates, the RICO Act requires the blanket forfeiture of any "enterprise" – bookstore, theater, network, or museum – involved in disseminating two "obscene" works. It therefore grants government authorities the power to impose an institutional "death sentence" upon speakers like Petitioner who have engaged in even limited examples of unlawful speech in the past.

In *Near v. Minnesota*, this Court struck down an analogous prior restraint, invalidating a statute which authorized an injunction against future publication in order to abate "malicious, scandalous and defamatory" periodicals as a public nuisance. Because nine previous editions of the *Saturday Press* contained such matter, the trial court had enjoined both its future publication and other, similar expression. The Court squarely held this remedy unconstitutional: unprotected speech such as defamation could be punished subsequent to its publication, but not by restraining other unlitigated speech.

Thus, although materials adjudicated obscene and proceeds directly attributable to their sale may be forfeited, to effect closure of the business itself by forfeiting all its assets, instrumentalities, and communicative inventory has a qualitatively different censorial effect by directly suppressing *other*, presumptively-protected materials which would be distributed in the future.

Petitioner in this case was found to have distributed only seven obscene items over a thirty-year history of engaging in protected erotic expression. Even if he had suffered many more convictions for unprotected speech, the rule prohibiting prior restraint would be the same under *Near*, 283 U.S. at 720, where the Court observed:

"It does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has the right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else."

This Court has consistently repudiated government's attempts to finesse the First Amendment by resort to "mere labels," which cannot confer "talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Fort Wayne Books v. Indiana*, 489 U.S. at 67, the Court reaffirmed this principle, clearly mandating the application of First Amendment analysis to these provisions of the RICO Act: "[T]he state cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'"

"As far back as the decision in *Near v. Minnesota*, this Court has recognized that the way in which a restraint on speech is 'characterized' . . . is of little consequence. . . . For example, in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), we struck down a prior restraint placed on the exhibitions of films under a Texas 'public nuisance'

statute, finding that its failure to comply with our prior case law in this area was a fatal defect." *Id.* at 66. (Citations omitted.)

Most recently in *Simon & Schuster v. New York Crimes Victims Board*, ___ U.S. ___, 112 S. Ct. 501 (1991), this Court staunchly reaffirmed that such remedies even for *non-speech-related* criminal activity violate the First Amendment where they operate invidiously to curtail protected speech, rejecting out of hand the state's formalistic arguments that First Amendment scrutiny should not apply. In *Simon & Schuster*, the Court invalidated New York's "Son of Sam" law, which required that any publisher or other "entity" pay over to the Crime Victims Board any funds it owed a person "accused or convicted of a crime" under a contract to produce a book or other work describing the crime.

First, this Court dismissed the state's contentions that First Amendment scrutiny should not apply, arguments which closely track those the government advances in defense of RICO forfeiture in obscenity cases. The state maintained, for example, that the discriminatory burden on certain speech did not trigger First Amendment scrutiny because the legislature did not *intend* to suppress speech about crime, much as the government has argued RICO forfeitures for obscenity are constitutionally immune because they allegedly are not *intended* to censor. The Court dismissed this contention as

"incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' . . . As we concluded in *Minneapolis Star*, '[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.' " 112 S. Ct. at 509.

Next, in *Simon & Schuster* the state attempted to avert First Amendment scrutiny by reference to the fact that the law focused its requirements on any "entity" rather than specifically on the *media*. Likewise, the government has contended that the First Amendment is not relevant in this case

because RICO forfeitures target "racketeering enterprises," and constitute "punishment" rather than "prior restraint." This Court has without hesitation rejected such disingenuous, formalistic sophistries, noting in *Simon & Schuster*, 112 S. Ct. at 509, that such an argument

"falters on both semantic and constitutional grounds. Any 'entity' that enters into such a contract [is] by definition a medium of communication In any event, the characterization of an entity as a member of the 'media' is irrelevant for these purposes. The Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."

Similarly, the government's talismanic invocations of "racketeering" attempt to mask semantically the fact that where obscenity is the predicate offense, *by definition* RICO forfeiture applies to destroy the entire media business of which the unprotected speech was but a minute part. And on constitutional grounds, the government cannot escape First Amendment scrutiny of this censorial remedy merely on grounds that it is "punishment" for "criminal activity." As this Court made clear in *Simon & Schuster*, where speech is at stake this assertion merely begs the question whether such "punishment" exceeds the bounds set by the First Amendment. Certainly, this Court would not allow New York to impose the same invidious burden on "crime stories" simply by recharacterizing it as "punishment" rather than as restitution to victims.

The unconstitutional flaw in New York's victim compensation scheme was that it discriminatorily burdened, and inevitably would act to curtail, protected speech on the basis of its content: the law singled out speech about one's crimes. Because this law invidiously burdened speech on the basis of its content, the Court subjected it to strict scrutiny and concluded the content-based law was not necessary to advance the state's objective of compensating crime victims. Even assuming that the escrowed income represented "the fruits of crime," the

Court said, the state had no compelling need to single out the proceeds of protected "storytelling." 112 S. Ct. at 510.

RICO forfeiture poses much graver constitutional problems, for two reasons. First, the RICO forfeiture remedy is so broad that it operates not just as a burden but as a complete prospective *ban* on future speech by the offending business. Whereas the confiscation of funds under the Son of Sam law would certainly tend to chill and inhibit speech, it did not have the absolutely *preclusive* effect of RICO forfeiture. Second, the triggering criminal conduct is itself speech. Whereas the New York law singled out speech by specifying its proceeds as the sole source for compensating the speaker's crime victims, the conduct triggering liability was hard-core crime such as murder which did not implicate speech in the first instance, and thus open the door wide for government to target speakers of whom it does not approve.

The fact that the disfavored speech itself triggers RICO liability has a double significance. It means first of all that by definition, the draconian RICO forfeiture remedy will operate to shut down those businesses which were engaged in speech activities. Second, it means that the statute wreaks its destruction when the government has targeted officially-disapproved speech for obscenity prosecution, armed with the ability to eradicate the offending speaker from the marketplace of ideas, information, and entertainment. For these reasons, the First Amendment concerns are even more heightened here than in *Simon & Schuster*, and the courts below fundamentally erred in holding essentially that First Amendment scrutiny does not apply.

Justice Kennedy, concurring in *Simon & Schuster*, would have simply applied a *per se* rule to hold that the Son of Sam law's content-based discrimination violated the First Amendment, rather than the compelling interest analysis the majority applied 112 S. Ct. at 512-515. He pointed out that because the New York statute singled out speech for a burden on the basis of its content, it raised First Amendment problems over and above the content-neutral burdens that invoked compelling-interest analysis on equal protection grounds in cases like *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of*

Revenue, 460 U.S. 575 (1983). Government will *never* have sufficient justification for discriminating against protected speech on the basis of its content, Justice Kennedy suggested, and to apply even a compelling-interest balancing test "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so." 112 S. Ct. at 513.

Justice Kennedy's concerns are certainly realized in this case, where the government has violated an even more bedrock principle of First Amendment law: the *Near v. Minnesota* prohibition against prior restraints. If there is any *per se* rule limiting governmental restraints on speech, it is the rule from *Near* that past abuses of free speech cannot be redressed by measures which broadly and directly prevent one from speaking in the future. Because a contrary rule would allow government enormous discretion to stifle disfavored speech and speakers prospectively, this Court has held in *Near* and subsequently that government simply cannot punish offensive, unprotected speech by suppressing other, presumptively-protected speech in the future.

In the forfeiture context, "content neutrality" is a First Amendment vice, because it permits the government to suppress unlimited quantities of expressive materials, regardless of their content, solely because other material on an adjacent shelf has been determined obscene, just as in *Near* the state forbade future publication of the *Saturday Press* because past editions were deemed defamatory. Indeed, this sort of blanket restraint of future speech is such an egregious First Amendment violation that after the Court first denounced it in *Near*, to the knowledge of Petitioner's counsel it has come before this Court in only one other case, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), in which the Court invalidated as a prior restraint a content-neutral order enjoining the distribution of "'pamphlets, leaflets or literature of any kind.'"

This Court made clear in *Fort Wayne Books* that the prior restraint doctrine, and all other principles of First Amendment review, fully apply in the RICO/obscenity context. Although *Fort Wayne Books* left undecided the issue of

RICO's post-conviction forfeiture remedies, the result is equally clear under this Court's prior decisions. The RICO Act as applied in obscenity cases is the most incomparably censorial legislative measure in memory, and the court below erred dangerously in upholding its application to destroy media businesses. RICO forfeitures must be invalidated as an overbroad response to obscenity offenses, if the bedrock rule of *Near v. Minnesota* is not to be eviscerated, and the chilling effect doctrine rendered meaningless.

B. The Eighth Circuit's Decision Upholding RICO Forfeiture Also Conflicts With Decisions of Numerous Other Circuits, and of Innumerable State Courts, Striking Down Indistinguishable Remedies for Obscenity Violations.

The Eighth Circuit's decision below, and the Fourth Circuit's opinion in *United States v. Pryba*, create a dramatic split of authority between those circuits and at least four circuits, along with innumerable state courts, which have struck down even less restrictive penalties for obscenity for overbreadth or as patently invalid prior restraints.

Following the unequivocal rule of *Near*, a multitude of courts have rejected attempts to punish obscenity by means of prior restraints considerably less drastic than RICO's outright forfeitures. With virtual unanimity, state and federal courts have blocked attempts to close bookstores and theaters as "nuisances" by padlocking or injunction, or by revoking their licenses, upon a showing that they have sold or exhibited obscenity in the past.¹⁶

¹⁶ In the following cases, courts have held unconstitutional nuisance laws which provided for the padlocking of businesses where obscenity offenses occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. en banc 1978), *aff'd.* on other grounds, 445 U.S. 308 (1980);

(Continued on following page)

Prior to these two RICO cases, virtually every court to consider the issue concluded that such statutes are

(Continued from previous page)

Pollitt v. Connick, 596 F. Supp. 261, 269-272 (E.D.La. 1984); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), cert. den. 429 U.S. 922 (1976); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *New Riveria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La. App. 1972); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La. App. 1974); *State ex rel. Blee v. Mohny Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); *City of Minot v. Central Ave. News, Inc.*, 308 N.W. 2d 851 (N.D. 1981); *Parish of Jefferson v. Bayou Landing Ltd., Inc.* 350 So.2d 158 (La.1977), overruling La.App., 341 So.2d 23; *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla.1971). See also *Nihiser v. Sendak*, 405 F. Supp. 482, 491-492 (N.D.Ind. 1974), vacated and remanded on other grounds, 423 U.S. 976 (1975), order re-entered August 16, 1976 (unpub.), aff'd. 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612, n. 23 (1975); cf. *Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied because of a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1207-09 (C.D.Ill. 1979), aff'd. 619 F.2d 1203, 1217-1220 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D.Utah 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F. Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F. Supp. 151 (M.D.Fla. 1979); *Natco Theatres Inc., v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F. Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v.*

(Continued on following page)

facially invalid because they impose prior restraints of the type struck down in *Near*. Four federal circuit courts had so held, first in *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. 1978), aff'd. on other grounds, 445 U.S. 308 (1980), in which all 14 judges of the en banc panel agreed that a business could not be padlocked because it had committed obscenity offenses. The Sixth, Seventh, and Eleventh Circuits agreed, holding that business licenses could not be denied or revoked in response to obscenity violations. See *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980).

As noted above, many state courts of last resort have also struck down prospective restraints imposed as punishment for obscenity. Typical of their reasoning is the Georgia Supreme Court's opinion in *Sanders v. State*, 231 Ga. 608, 613-614, 203 S.E.2d 153, 157 (1974):

"The injunction closing the store and padlocking it as a public nuisance necessarily halted the

(Continued from previous page)

Myerson, 352 F. Supp. 994 (S.D.N.Y. 1972); *Oregon Bookmark Corp. v. Schunk*, 321 F. Supp. 639 (D.Oregon 1970); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *City of Delevan v. Thomas*, 31 Ill. App.3d 630, 334 N.E.2d 190 (1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.Cr.Ct. 1979); *State v. Bauer*, 159 Ariz. 443, 768 P.2d 175 (Ariz. App. 1988); see also *Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); cf. *Marks v. City of Newport Ky.*, 344 F. Supp. 675 (E.D.Ky. 1972); *Chulchian v. City of Indianapolis*, 477 F. Supp. 128, 131-132 (S.D.Ind. 1979), aff'd., 633 F.2d 27, 30 (7th Cir. 1980).

future sale and distribution of other printed material which may not be obscene, thereby . . . creating an unconstitutional restraint.

"[T]he overly broad coverage contemplated by this statute . . . creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society, free of obscene publications but otherwise full of poetry and prose."

In *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), the court likewise concluded that the state RICO statute's post-conviction remedies including forfeitures would be invalid prior restraints if they restricted future, presumptively-protected speech. The Arizona court invalidated such forfeitures insofar as they extended beyond the obscene materials themselves, or proceeds from materials determined to be obscene, and construed the statute accordingly. Citing *J-R Distributors*, 725 F.2d at 497, the court held that proceeds from sales of protected materials could not be forfeited, nor could neutral speech-facilitating property such as bookshelves be confiscated.

In *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 493-496 (1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Ninth Circuit invalidated a law which sought to regulate obscenity by defining the business which disseminated it as a "moral nuisance," punishable by unlimited civil fines calculated on the basis of the businesses profits.¹⁷ The

¹⁷ Although denied precedential value by its reversal on procedural grounds, the *J-R Distributors* treatment of this issue has subsequently been implicitly endorsed in *Polykoff v. Collins*, 816 F.2d 1326, 1338-1339 (9th Cir. 1987).

court concluded this civil penalty provision was "an obviously unconstitutional feature" of the statute:

"The statute defines a 'moral nuisance' . . . as a 'place' where obscene materials . . . may be found. Thus, the civil fine, which is premised in part on profits 'attributable to the moral nuisance,' may be based on profits from the sale of protected materials in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there." *Id.* at 493-494.

The *J-R Distributors* court held that "it is impermissible, in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutionally protected material." *Id.* at 494. The statute's undue consequences for constitutionally protected speech were the central concern:

"By focusing on the place where the obscene materials are sold or exhibited rather than the unprotected materials themselves, the civil fine provision endangers protected speech. Courts that have addressed similar issues have held that abatement of a moral nuisance 'must be directed to the particular books or films which have been adjudged obscene . . . rather than against the premises in which the material is sold, exhibited, or displayed.' A contrary result would allow the government to punish protected first amendment expression simply because obscene speech was also disseminated from the same place." *Id.* at 494.

Similarly in the case at bar, once a few items were determined obscene, every transaction at every business Petitioner owned was retroactively deemed illegal, and its proceeds forfeited along with all the other assets, instrumentalities, and inventory.

The Eighth Circuit's decision in this case unquestionably conflicts with the Ninth Circuit's opinion in *J-R Distributors*, as it even more dramatically conflicts with decisions of the Fifth, Sixth, and Eleventh Circuits. Given the government's aggressive enforcement policies and the

patent detriment to important First Amendment interests, this Court's review of the RICO forfeiture issue is essential.

When the government is already setting flame to inventories of protected books, magazines, and videotapes, this issue has too long gone unaddressed.¹⁸

II. THE FORFEITURE OF A \$25 MILLION BUSINESS, IN ADDITION TO A SIX-YEAR PRISON TERM AND \$200,000 IN FINES, IS GROSSLY DISPROPORTIONATE PUNISHMENT FOR DISTRIBUTING SEVEN OBSCENE ITEMS, AND THE COURT OF APPEALS' SUMMARY REJECTION OF PETITIONER'S EIGHTH AMENDMENT CHALLENGE DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE NINTH, TENTH, AND SEVENTH CIRCUITS.

The sum of the penalties inflicted upon Petitioner is shockingly disproportionate to the offense, amassing the forfeiture of his \$25 million business atop a six-year prison term and over \$200,000 in fines, all for distributing seven magazines and videos deemed obscene. The court below essentially refused to consider Alexander's Eighth Amendment challenge to this egregiously cruel and unusual sentence, adopting the Fourth Circuit's curious position that no proportionality review is required of any sentence less than life imprisonment without parole. In so doing, it ignored this Court's interpretation of the Eighth Amendment as requiring proportionality review, and is in direct conflict with the Ninth, Tenth, and Seventh

¹⁸ "Play the man, Master Ridley; we shall this day light such a candle, by God's grace, in England, as I trust shall never be put out." – Hugh Latimer to Nicholas Ridley as they were being burned alive at Oxford for heresy (October 16, 1555). J.R. Green, *A Short History of the English People* (1874).

Circuits' rule requiring proportionality in RICO forfeiture cases.¹⁹

On historical grounds as well as under this Court's current proportionality analysis, this sentence merits close Eighth Amendment scrutiny and condemnation as "cruel and unusual punishment," and as an excessive fine. In 1790, even before it passed the Bill of Rights, the First Congress acted to abolish the common law doctrine of forfeiture of estate. RICO forfeitures represent the only significant revival of such blanket *in personam* forfeitures ever since that time. This historical fact, in combination with the mandatory, wholesale nature of the forfeitures mandated by the RICO Act, should make a sentence like that imposed on Petitioner immediately suspect under the Eighth Amendment.

This Court's contemporary approach to Eighth Amendment issues likewise mandates careful review of such a sentence. In *Robinson v. California*, 370 U.S. 660 (1962), the Court invalidated a statute making addiction to narcotics a criminal offense. The 90-day jail term imposed for this status offense was "cruel and unusual" even though the jail time was

"not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667.

In *Solem v. Helm*, 463 U.S. 277, 284 (1983), this Court reaffirmed that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Although reviewing courts should grant the trial court and the legislature substantial deference, "no penalty is *per se* constitutional," the Court noted, citing *Robinson*, 463 U.S.

¹⁹ See *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *United States v. Harris*, 903 F.2d 770 (10th Cir. 1990); *United States v. Vriner*, 921 F.2d 710 (7th Cir. 1991).

at 290. Most recently, in *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680 (1991), seven members of this Court reaffirmed that the Eighth Amendment entails a guarantee of proportionality in sentencing.

The Ninth Circuit consistently applied this Court's *Solem* analysis in *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), concluding that the mandatory blanket forfeitures required by § 1963(a) raised proportionality questions even in a case implicating no First Amendment interests. The court reversed and remanded the forfeiture order, instructing the trial court to determine whether blanket RICO forfeiture was disproportionate:

"The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations . . . resulting in relatively little illegal gain in proportion to its size and legitimate income." 817 F.2d at 1415-1416.

In this case, not only was the Petitioner's business "essentially legitimate": he engaged in a business protected by the First Amendment for over thirty years, the millions of protected transactions dwarfing the dissemination of seven obscene items for which he now stands convicted.

Busher has become a cornerstone case applying *Solem v. Helm*, proportionality analysis to criminal forfeitures. Two other circuits have adopted this Ninth Circuit rule, in *United States v. Harris*, 903 F.2d 770, 777 (10th Cir. 1990), and *United States v. Vriner*, 921 F.2d 710, 712 (7th Cir. 1991). Another has cited it with approval: *United States v. Angiulo*, 897 F.2d 1169, 1211-1212 (1st Cir. 1990). See also *United States v. Robinson*, 721 F. Supp. 1541 (D.R.I. 1989).

In this case, however, the Court of Appeals repeated the error of the Fourth Circuit in *United States v. Pryba*, 900 F.2d at 757, by adopting the anomalous view that "*Solem v. Helm* does not require a proportionality review of any sentence less than life imprisonment without the

possibility of parole." 943 F.2d at 836 (App. 25.) "We cannot conclude," the court went on, "that the district court abused its discretion in sentencing Alexander." *Id.* This cursory dismissal of Alexander's Eighth Amendment challenge to this extreme judgment for obscenity offenses even ignores the fact that the trial court *had no discretion* with regard to forfeiture because § 1963(a) makes total forfeiture mandatory upon conviction.

The Eighth Circuit's decision on this point, and those of the Fourth Circuit on which it relied, clearly conflict with the Ninth, Tenth, and Seventh Circuits' application of proportionality in *Busher* and its progeny, a conflict which urgently requires this Court's resolution. In this regard among others, the court below has alarmingly misapprehended both Eighth and First Amendment doctrine, and the broader implications of its errors, particularly in their detriment to First Amendment rights, even more urgently calls for redress by this Court.

* * *

Whether from the perspective of the First Amendment's or the Eighth Amendment's restrictions on governmental power, the remedies the government has invoked below are monstrously inappropriate and unacceptable. They should be rejected because they exact far too great a cost from communicative businesses for an error involving expression, and because they extend too tempting an invitation for government to suppress disfavored speech.

Libel, slander, invasion of privacy, and obscenity all represent errors of judgment by media businesses. The unprotected nature of such speech offenses is usually discernible, if at all, only long after the challenged conduct. An essential theme of this Court's interpretations of the First Amendment has been that its protection serves as a necessary buffer between those engaged in controversial, robust, or error-prone expression and those who would censor it.

The ultimate vice of the RICO forfeiture remedy as approved by the court below is that the First Amendment buffer will be diminished to the vanishing point, to the quick

detriment of all speech, not just erotica. Just as *New York Times v. Sullivan* was predicated upon *Smith v. California*, First Amendment protection for newspapers, movie studios, and the electronic media will not long survive the deployment of obscenity-predicated RICO forfeitures. For if unlimited penalties may be assessed against media businesses for such mistakes, then there is no constitutional impediment to destroying our great newspapers with unlimited sanctions for libel or jeopardizing national security.

There is simply no principled distinction between the government's destruction of Petitioner's erotica businesses because of seven wrong guesses about community standards regarding obscenity, and silencing the *New York Times* for improperly publishing the advertisement about Mr. Sullivan. Both cases involve communicative material of interest to vast segments of the American people; both involve isolated instances of unprotected expression. Both were initially subjected to harsh economic consequences fatal to their continuing survival as media businesses, resulting in a total embargo on their messages to the public. The *New York Times* was ultimately reprieved by this Court. If Ferris Alexander is not, then Mr. Sullivan may well still have the last laugh.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

JOHN H. WESTON*

CATHY E. CROSSON

G. RANDALL GARROU

CLYDE F. DEWITT

WESTON, SARNO, GARROU & DEWITT

433 N. Camden Drive, Suite 900

Beverly Hills, California 90210

(310) 550-7460

Attorneys for Petitioner

*Counsel of Record

App. 1

APPENDIX A

Ferris ALEXANDER, Appellant,

v.

**Richard THORNBURGH, in his official
capacity only as Attorney General
of the United States, Appellee.**

UNITED STATES of America, Appellee,

v.

**Ferris Jacob ALEXANDER, Sr., a/k/a
Pete Saba, Peter Saba, Paul Saba, John
Thomas, Bob Olson, Jim Nelson, Jim
Peterson, James Peterson, Robert Carl-
son, Frank Netti, Appellant.**

Nos. 89-5364, 90-5417.

**United States Court of Appeals,
Eighth Circuit.**

Submitted March 13, 1991.

Decided Aug. 30, 1991.

**Rehearing and Rehearing En Banc
Denied Oct. 30, 1991.**

**Before JOHN R. GIBSON and WOLLMAN, Circuit
Judges, and FLOYD R. GIBSON, Senior Circuit Judge.**

JOHN R. GIBSON, Circuit Judge.

**Following a four-month trial, a jury convicted Ferris
J. Alexander, Sr., on 24 counts¹ of a 41-count indictment.**

¹ A jury convicted Alexander on one count of conspiracy to defraud the United States by impeding the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. § 371

(Continued on following page)

The counts included conspiracy to defraud the IRS, the sale of obscene magazines and videos, tax evasion, and RICO violations. Alexander appeals from his convictions and the application of the forfeiture provisions of 18 U.S.C. § 1963 (1988). Alexander argues that his conviction of engaging in a conspiracy to defraud the IRS should be reversed because: (1) the indictment alleged and the evidence showed, if anything, multiple conspiracies and not one conspiracy; and (2) the count was defective because it charged a general conspiracy rather than a conspiracy to violate a specific statute. He also argues that his convictions for transporting obscene materials must be reversed because the jury's verdicts are inconsistent. He also attacks the district court's² application of the forfeiture provisions of RICO, arguing that the application of RICO:

(Continued from previous page)

(1988); two counts of filing false income tax returns in violation of 26 U.S.C. § 7206(1) (1988); three counts of violating 18 U.S.C. § 1962 (1988) (RICO), including conspiracy to engage in or conduct an enterprise through a pattern of racketeering activity, receipt and use of income derived from a pattern of racketeering activity, and engaging in the conduct of an enterprise through a pattern of racketeering activity; twelve counts of knowingly transporting obscene material in interstate commerce for the purpose of sale or distribution in violation of 18 U.S.C. § 1465 (1988); five counts of engaging in the business of selling or transferring obscene material in violation of 18 U.S.C. § 1466 (1988); and one count of falsely misrepresenting a social security number for the purpose of impeding the IRS in violation of 42 U.S.C. § 408(g)(2) (1988) (now codified at 42 U.S.C.A. § 408(a)(7)(B) (West Supp.1991)).

² The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

(1) unconstitutionally criminalized non-obscene expressive material; and (2) violated the first and eighth amendments to the United States Constitution. He further argues that the obscenity standards set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), violate his due process and first amendment rights. He also claims that the evidence was insufficient to support his convictions of filing a false income tax return, violating RICO, using a false social security number, and on all other counts. Finally, in a separate appeal, he appeals from the district court's³ entry of summary judgment in his civil suit filed against the government arguing that the use of obscenity as a predicate to RICO violated his first amendment rights. We affirm the convictions, and the orders of summary judgment and forfeiture.

The evidence presented at the four-month trial was far-reaching and spanned a thirty year period. Only a brief outline of that evidence is necessary for our purposes, and we will provide further details as required in analyzing the issues on appeal.

Alexander was in the adult entertainment business for more than 30 years selling magazines, showing movies, and eventually selling and leasing video cassettes. The evidence at trial established that Alexander set up sham corporations and operated many of his businesses using false names and names of employees.

³ The Honorable David S. Doty, United States District Judge for the District of Minnesota.

For example, evidence showed that from 1959 to 1976, Alexander used the name of an employee, Kenneth LaLonde, to conduct his businesses under the name of Kenneth LaLonde Enterprises. In 1969, Alexander hired an attorney, Robert J. Milavetz, who incorporated several corporations under the name of Kenneth LaLonde Enterprises. Alexander obtained licenses required for these businesses and opened bank accounts under LaLonde's name. Reports were also sent to the State of Minnesota under the name of Kenneth LaLonde Enterprises. The businesses were reported on LaLonde's individual tax return, and no corporate tax returns were filed.

Eventually, Milavetz had a falling out with Alexander and Alexander began using other attorneys, including Randall Tigie. In 1976, Tigie witnessed LaLonde's signature as the incorporator of two more corporations. Alexander consolidated the operation of his theaters and bookstores under these corporations, and on May 1, 1977, the name of LeRoy Wendling was substituted as the front name used to conduct Alexander's businesses. Alexander opened bank accounts for these corporations under the name of Wendling, another Alexander employee. These corporations were also reported to state and federal agencies showing Wendling as the owner. Corporate tax returns were filed and signed with a signature stamp of Wendling's name.

Wendling filed his personal tax returns listing Alexander's income. This arrangement continued until the end of 1980, when Wendling was fired, and the name "John Thomas" was substituted on some of these records and placed on the Wendling bank account. Alexander

admitted that the name "John Thomas" was "the name [he] used."

On December 27, 1984, In Sok Na, another Alexander employee, executed, as incorporator and first director, the articles of incorporation for ten different corporations. In Sok Na was a Korean immigrant and spoke little English. Alexander testified that he formed these corporations to avoid potential civil liability. The names of six of the corporations were in Finnish and four were in a dialect of the Philippines.⁴ None of these corporations filed tax returns. Two of the corporations were used to buy real estate and a bookstore.

In addition to using the names of LaLonde, Wendling, and Na, Alexander used a number of other names in operating bank accounts, obtaining licenses, and complying with various state and federal reporting regulations.

The government's evidence showed several examples of the lengths to which Alexander went to conceal his identity as the owner and operator of his various businesses. During the time Alexander ran his businesses under the name of LaLonde Enterprises, Alexander sent Milavetz to unemployment compensation hearings and instructed Milavetz to appear on behalf of Kenneth LaLonde or Kenneth LaLonde Enterprises. In one instance, LaLonde signed a license application for one of the theatres known as the "Flick." LaLonde appeared

⁴ The translation of these corporate names was profane, and the district court excluded the translation as having more prejudicial value than probative value.

before the St. Paul City Council in the licensing application proceedings acting as the "owner" of the business. After the City Council balked at granting the license, Tigie advised the Council that he represented Alexander and LaLonde and a lease existed between the two. Subsequently, Tigie filed a lawsuit in the United States District Court against the City of St. Paul and its council members on behalf of Alexander and LaLonde stating that a lease existed between LaLonde and Alexander. The city council subsequently granted the license in LaLonde's name. LaLonde testified that he became aware of the lawsuit by reading about it in the newspaper, that he never had a lease on the business, and that his signature verifying the complaint, notarized by Tigie, was a forgery. In later years, licenses were issued in LaLonde's name without his knowledge, but with the participation of Tigie, and continued after LaLonde left Alexander's employ.

The revenues generated from Alexander's retail and rental stores were brought to him at the central warehouse and main office where the cash was commingled and taken to various banks. Alexander deposited some of the cash in various accounts and converted the rest into large denomination bills, cashier checks, and money orders. The cashier checks and money orders were payable to various individuals and entities. All expenses were paid out of Alexander's primary bank accounts, and all merchandise was shipped from California to his warehouse, where it was wrapped, priced, and boxed for distribution to Alexander's retail outlets. Because of disorganized and incomplete records, the government had a difficult time attempting to calculate Alexander's income. Nevertheless, the government estimated that Alexander

underreported his 1982 gross receipts by \$1,322,135 and \$1,416,883 in 1983.

Alexander testified about many of these details. He confirmed that he used LaLonde, Wendling, and other individuals' names in the operation of his businesses, and that revenues from the businesses were reported on LaLonde's and Wendling's personal tax returns. He admitted that he purchased properties and submitted reports to state and federal agencies in other people's names. He attributed many of these decisions to Tigie and stated that he had no knowledge of some of the various businesses. Alexander also admitted that he signed a form on a Paine Webber investment account using a social security number that was not his social security number.

The jury found four magazines and three videos to be obscene, and these findings were the basis for convicting Alexander of transporting obscene material for the purpose of sale, selling obscene materials, and RICO counts.

After the return of guilty verdicts, the district court reconvened the same jury to hear a portion of the forfeiture proceeding under 18 U.S.C. § 1963(a)(2). The jury heard additional evidence, including Alexander's testimony regarding the forfeitability of his interest in the enterprise and the property that afforded him a source of influence over the enterprise. Thereafter, the district court reconvened without a jury for a further evidentiary hearing as to forfeiture of any interest Alexander had acquired or maintained in violation of section 1962 and of any property constituting proceeds obtained directly or

indirectly from racketeering activity. The government offered additional evidence of 30 magazines and 16 videos purchased or seized by the FBI during its criminal investigation, and an additional 418 videos and 9 magazines were admitted through the testimony of witnesses who had appeared as representatives of Alexander's wholesale sources.

The court sentenced Alexander to terms of imprisonment ranging from 36 to 72 months, all terms to run concurrently. *United States v. Alexander*, No. 4-89-85(1), Order and Judgment of Sentencing, slip op. at 3 (D.Minn. Aug. 13, 1990). In addition, the court imposed a fine of \$100,000 and a special assessment of \$950, and ordered Alexander to pay the costs of his incarceration (\$1,415.56 per month), his supervised release (\$96.66 per month), and the costs of prosecution (\$29,737.84) *Id.* at 6-7. Finally, pursuant to 18 U.S.C. § 1963(a)(2), the court ordered forfeiture of Alexander's interest in ten of fourteen pieces of commercial real estate in which the jury found beyond a reasonable doubt Alexander had an interest or which afforded Alexander a source of influence over the racketeering enterprise and which the court concluded were acquired, maintained, or derived from proceeds of the racketeering activity.⁵ *Id.* at 7 (incorporating Order and Judgment of Forfeiture (Aug. 6, 1990)). Alexander forfeited his interest in his wholesale business and thirteen retail businesses (bookstores and video stores) that were

⁵ Titles to the other four pieces of real estate Alexander used for his magazine and video businesses were held in the name of Dolores Alexander and were not forfeited to the United States as a result of the jury's forfeiture verdict.

used in the criminal enterprise, and \$8,910,548.10 in monies acquired, maintained, or constituting proceeds obtained from the racketeering activity in the years 1985 through 1988. *United States v. Alexander*, No. 4-89-85, Order and Judgment of Forfeiture, slip op. at 6, 11, 1990 WL 117882 (D.Minn. Aug. 6, 1990). Alexander also forfeited his interest in business assets and personal property. *Id.* at 6-11. This appeal followed.

I.

Alexander appeals the jury's verdict on the conspiracy count (Count 1) arguing that the count is defective in two ways. The indictment alleged that over the course of twenty years, Alexander engaged in a conspiracy to defraud the United States by defeating the lawful functions of the IRS. This has become known as a *Klein* conspiracy, taking its name from *United States v. Klein*, 124 F.Supp. 476 (S.D.N.Y.1954), *aff'd*, 247 F.2d 908 (2d Cir.1957), *cert. denied*, 355 U.S. 924, 78 S.Ct. 365, 2 L.Ed.2d 354 (1958).

Alexander contends that the district court must reverse his conviction on Count I because the indictment alleged a single overall conspiracy and the proof at trial showed not a single conspiracy, but a series of separate conspiracies. *Kotteakos v. United States*, 328 U.S. 750, 773-74, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946). Alexander argues that there was not just one conspiracy for twenty years, pointing out that at the time the alleged conspiracy started some key members were in high school. He further argues that he had dismissed many of the members of the alleged conspiracy and that they had

no knowledge of later transactions. He asserts that looking at the totality of the circumstances, this case is a "series of scenes of a life of hustling" and not one conspiracy.

Whether a conspiracy is one scheme or several is primarily a jury question. *United States v. Wilson*, 497 F.2d 602, 604 (8th Cir.), cert. denied, 419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 664 (1974). As this court has stated:

The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. . . . A conspirator need not know all of the other conspirators or be aware of all the details of the conspiracy, so long as the evidence is sufficient to show knowing contributions to the furtherance of the conspiracy.

United States v. Massa, 740 F.2d 629, 636 (8th Cir.1984) (quoting *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir.1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981)), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (other citations omitted).

We have also stated that "[t]he existence of a single agreement can be inferred if the evidence revealed that the alleged participants shared 'a common aim or purpose' and 'mutual dependence and assistance' existed." *United States v. DeLuna*, 763 F.2d 897, 918 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (citations omitted).

We are satisfied that the evidence supported a jury finding of a single *Klein* conspiracy, spanning many years and involving numerous individuals with the common

goal of impairing and impeding the IRS in determining the nature and extent of Alexander's businesses. We therefore reject Alexander's argument that Count I was defective because it failed to allege multiple conspiracies.

Second, Alexander argues that Count I of the indictment is defective because it should have charged him with a conspiracy to commit a specific crime under 26 U.S.C. § 7206(1) (1988), rather than a conspiracy to defraud under 18 U.S.C. § 371. Alexander relies on *United States v. Minarik*, 875 F.2d 1186 (6th Cir.1989), and *United States v. Mohnney*, 723 F.Supp. 1197 (E.D.Mich.1989).

In *Minarik*, the defendants were charged with willfully conspiring to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Department of the Treasury in violation of 18 U.S.C. § 371. 875 F.2d at 1188. The government did not allege a conspiracy to commit an offense against the United States – another provision of 18 U.S.C. § 371, despite the fact that its evidence at trial and the bill of particulars alleged that the conspiracy was one to violate 26 U.S.C. § 7206(4) (concealment of assets with intent to evade or defeat assessment of tax). *Id.* at 1188-89. The Sixth Circuit stated that when Congress has enacted a specific statute addressing a given problem, thus creating a specific offense, "[t]he court should require that any conspiracy prosecution charging that conduct be brought under the offense clause" of 18 U.S.C. § 371, rather than under the defraud clause of that statute. *Id.* at 1193. In *Mohnney*, a Michigan district court dismissed the first count in an indictment alleging conspiracy to defraud the government because the government's accusation in the count was essentially a charge that defendants conspired

to violate 26 U.S.C. § 7206, and therefore, under *Minarik* the conspiracy had to be charged under the offense clause of the conspiracy statute. 723 F.Supp. at 1203.

Minarik is quite limited, however, to its facts. As that court explained:

[t]he "offense" and "defraud" clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 26 U.S.C. § 7206(4). . . .

875 F.2d at 1187.

In *Minarik*, the defendants engaged in a narrow course of conduct directed at one object – to sell a house and get the money in an untraceable manner. This obviously is not the circumstance in this case in which Alexander's conduct is long-spanning, far-reaching, and involves many activities and events. Moreover, Alexander does not even argue that he lacked adequate notice of the charge he had to defend, and at least one court has held that this is the only holding of *Minarik*. *United States v. Reynolds*, 919 F.2d 435, 438-39 (7th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1402, 113 L.Ed.2d 457 (1991); *see also United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir.1991), *pet'n for cert. filed*, No. 90-1803 (May 22, 1991). We do not believe that *Mohney* is applicable or persuasive. We reject Alexander's argument that Count I was defective because it alleged a violation of 18 U.S.C. § 371.

II.

Alexander next argues his convictions for transporting and selling obscene materials must be vacated

because the jury's verdicts are inconsistent, and the inconsistency mandates a conclusion that there was insufficient evidence to support these convictions. Alexander contends that the jury verdicts are inconsistent because the jury found some items obscene in one count and not obscene in other counts. Specifically, Alexander points out that the jury returned a verdict of not guilty on some of the counts involving the magazine the *Fat Book*, and guilty verdicts as to other counts involving the same magazine. He also says a verdict inconsistency is shown by comparing the jury's guilty verdict on Count XXXIX involving the magazines "Sweet" and "Party,"⁶ and not guilty verdicts on all counts involving the single sale of the magazine "Sweet." (Counts XXVI, XXVII and XL).

Alexander's argument is spurious. The court instructed the jury that when a count alleges two different videotapes or magazines to be obscene, they must find only *one* of them to be obscene in order to return a guilty verdict.⁷ The verdicts therefore are not inconsistent.

⁶ The jury found some of these materials obscene, and their titles insofar as they are not descriptive of the contents, serve to create interest in the contents. As the argument is directed at the inconsistency of the evidence, and not the sufficiency, we believe it sufficient to simply identify the first magazine by its last word "Party," and the other by its first word "Sweet."

⁷ Alexander argues in his reply brief that the court's instruction is constitutionally impermissible because the instruction did not allow the jury to make a specific finding of

Alexander further argues that the jury did not apply contemporary community standards, but instead made impermissible distinctions based on values of taste, morality, and cultural rejection, resulting in inconsistent or compromise verdicts. Alexander's argument asks us to speculate on how the jury reached its verdicts, which we may not do. The district court defined obscenity in accordance with the definition of obscenity announced in *Miller v. California*, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2614-2615, 37 L.Ed.2d 419 (1973). Under its instructions, the question of obscenity is one of fact to be determined by the jury, and we cannot conclude that the jury's verdicts are inconsistent or the result of compromise. Moreover, this court has explained " 'inconsistency of a verdict on separate counts of an indictment does not entitle a convicted defendant to reversal of a judgment of conviction.' " *United States v. Martin*, 933 F.2d 609, 612 (8th Cir.1991) (quoting *United States v. Bryant*, 766 F.2d 370, 376 (8th Cir.1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986)). We reject Alexander's argument that his convictions for transporting and selling obscene materials should be reversed because the verdicts are inconsistent or the result of compromise.

(Continued from previous page)

which item in the two-item counts is obscene. Alexander, however, does not say that he objected to this instruction, and, in any event, we see nothing impermissible about such an instruction.

III.

Alexander also argues in both his civil and criminal appeals⁸ that the legal standard of obscenity enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), violates the fifth amendment's due process clause and the first amendment's freedom of speech provision. He claims that the rationales advanced for criminalization of sexually explicit materials are fundamentally antithetical to the constitutional guarantees of free speech and privacy. Alexander goes on to argue that statutes criminalizing the distribution of obscenity are inherently overbroad and that the *Miller* test fails to provide fair notice of prohibited speech and encourages arbitrary enforcement, which renders the federal obscenity statute void for vagueness and unduly chilling free speech.

We summarily reject Alexander's arguments. The district courts did not err in rejecting Alexander's invitation to overturn *Miller*. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57-58, 109 S.Ct. 916, 924-925, 103 L.Ed.2d 34

⁸ In his civil suit, Alexander sought: 1) a declaratory judgment that the application of the RICO statute to obscenity offenses violated his first amendment rights, and 2) a permanent injunction prohibiting the application of the RICO statute to obscenity offenses. The district court granted the Attorney General's motion to dismiss and motion for summary judgment. *Alexander v. Thornburgh*, 713 F.Supp. 1278 (D.Minn.), *appeal dismissed*, 881 F.2d 1081 (8th Cir.1989). Alexander's appeal in that case has been consolidated with the appeal from his criminal convictions, and to the extent the issues in his civil appeal are not moot, the issues are discussed in this opinion.

(1989) (reaffirming *Miller*). If this is to be done, it must be done by the Supreme Court.

IV.

Alexander argues that the application of the forfeiture provision of 18 U.S.C. § 1962 unconstitutionally criminalizes nonobscene expressive material. He argues that sexually explicit expressive materials are not obscene until a trier of fact in an adversarial judicial proceeding utilizing the three-part test enunciated in *Miller*, 413 U.S. at 23-24, 93 S.Ct. at 2614-2615, finds them to be obscene, and that the *Miller* test must be applied to *all* material the government seeks to restrain. Alexander relies on *Marcus v. Search Warrant of Property*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), and *Vance v. Universal Amusement Company*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), to support his position. Alexander argues that *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), requires that any law restricting speech be tested for its operation and effect on protected speech, and that *Marcus* and *Vance* applied such a test in refusing to endorse obscenity laws that interfered with the sale of nonobscene materials. In *Marcus*, the Supreme Court invalidated the large-scale confiscation of expressive materials without a prior adversarial hearing as an impermissible prior restraint. 367 U.S. at 731-33, 81 S.Ct. at 1715-17. In *Vance*, the Court prohibited the "padlocking" of businesses for up to a year for past violations of obscenity laws as an impermissible prior restraint. 445 U.S. at 317, 100 S.Ct. at 1162. Alexander recognizes that these cases involved prior restraints, but argues that these cases show the need for an adversarial proceeding

focusing on the question of obscenity for *all* of the materials finally restrained.

Alexander continues in his argument focusing on section 1962(c), which requires that an accused conduct an enterprise through a pattern of racketeering activity. The nub of Alexander's argument is that to prove a criminal enterprise under RICO, *Miller* requires the government to charge and prove that: (1) all the materials sold by the enterprise taken as a whole are obscene; or (2) all the materials sold by his enterprise considered as individual works are obscene. He claims that the application of section 1962(c) to this case has created the absurd result of criminalizing the sale of millions of dollars of non-obscene materials by an enterprise that during its 20 years of existence sold just four magazines and three videotapes that were later found to be obscene.

The Fourth Circuit rejected many, if not all, of Alexander's arguments in *United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990). In *Pryba*, the defendants were convicted on seven counts of transporting obscene materials in interstate commerce for sale and distribution, and these counts, coupled with prior state obscenity convictions, were used as predicate RICO offenses. The *Pryba* defendants argued that the forfeiture order resulted in "the confiscation and restraint of a vast inventory of presumptively protected expressive material," and the application of the forfeiture provisions resulted in an unconstitutional prior restraint of protected activity. They also argued that the RICO forfeiture provisions violated the first amendment because the provisions lacked the

procedural safeguards necessary to insure that protected expression was not erroneously suppressed. *Id.* at 753.

The Fourth Circuit's answer to *Pryba's* arguments directly applies to the nearly identical arguments made by Alexander. The court stated:

The forfeiture provided by 18 U.S.C. § 1467 does not violate the First Amendment even though certain materials, books and magazines, that are forfeited, may not be obscene and, in other circumstances, would have constitutional protection as free expression. There was a nexus established between defendants' ill gotten gains from their racketeering activities and the protected materials that were forfeited. The forfeiture did not occur until after defendants were convicted of violating various obscenity statutes and of participating in a racketeering activity, and until after it was established beyond a reasonable doubt that the proceeds from these criminal activities had been used to acquire the arguably protected publications.

Id. at 755.

The *Pryba* court rejected an argument that *Fort Wayne Books* required a different conclusion and stated further:

The forfeiture of nonobscene books, magazines and video tapes, after a conviction of racketeering involving the sale of obscene goods and after the jury has determined that the forfeited materials were acquired or maintained in violation of 18 U.S.C. § 1962 and afforded the *Prybas* a source of influence over the racketeering enterprise, does not violate the First Amendment. The fact that some of the materials forfeited are not obscene does not protect them

from forfeiture when the procedures established by RICO are followed, as they were in the present case.

Id. at 756.

Alexander argues that the decision of the Fourth Circuit in *Pryba* is not applicable as it dealt with a facial challenge to the RICO forfeiture statute and not to the unconstitutional application of section 1962.

We reject Alexander's distinction. As in *Pryba*, a jury convicted Alexander on the RICO charges brought under 18 U.S.C. § 1962(c) and predicate obscenity offenses under 18 U.S.C. § 1465. (Here, Alexander was also convicted under section 1466). Like *Pryba*, the jury found some items charged in the indictment obscene, some not, and was unable to reach a verdict on others. In both cases, after the jury reached a verdict finding violations of 18 U.S.C. § 1962, the same jury heard additional testimony on the issue of forfeiture, found that the defendants had an interest in property that gave them a source of influence over the enterprise, and ordered that certain of the assets, including the bookstores and video stores, be forfeited. *Pryba* differed from the case before us in that fifteen prior obscenity convictions of the corporate defendant were introduced in evidence. *Id.* at 758. Nevertheless, with this exception, the facts in *Pryba* are nearly identical to those here.

Furthermore, the government argues with persuasive force that in addition to the thirteen magazines and videos that were introduced, it was prepared to offer additional items not named in the indictment. On the state of this record, Alexander may not now argue that the jury

must have found all of the materials seized in the forfeiture proceedings obscene under *Miller*.

In his reply brief, Alexander asserts that *Sable Communications v. Federal Communications Commission*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), further supports his argument that the application of the RICO forfeiture provision unconstitutionally criminalized the sale of expressive material.

In *Sable*, the Supreme Court examined the constitutionality of a federal criminal statute prohibiting the sale of "indecent" or "obscene" commercial telephone messages. *Id.* at 117, 109 S.Ct. at 2832. The Court upheld the criminal prohibition against obscene messages, but struck down the ban on indecent messages. *Id.* Alexander argues that based on *Sable*, the government cannot criminally prosecute Alexander for selling non-obscene material any more than Congress could criminalize the sale of non-obscene messages.

Alexander's argument misses the mark. Alexander was not prosecuted for selling non-obscene material, and *Sable* has no bearing on the facts presented in this case. For the several reasons discussed, we reject Alexander's argument that the application of 18 U.S.C. § 1962 unconstitutionally criminalizes non-obscene expressive materials.

V.

Alexander next argues in both his civil and criminal appeals that the application of the RICO forfeiture

provisions violates the first amendment.⁹ Specifically, he contends that the forfeiture results in an unconstitutional prior restraint, imposes an unconstitutional chilling effect on constitutionally protected expression, and is constitutionally overbroad. The Fourth Circuit summarily rejected these same arguments in *Pryba*, concluding that "[o]bscenity is not protected by the First Amendment and a convicted racketeer may not launder his dirty money by investing it in materials that involve protected speech." 900 F.2d at 756.

Alexander, like the *Pryba* defendants, relies on *Fort Wayne Books* to support his position that the application of the RICO forfeiture provisions causes an unconstitutional prior restraint. There is, however, no similarity to the procedural posture in this case and the *pretrial* seizure condemned in *Fort Wayne Books*. 489 U.S. at 66, 109 S.Ct. at 929.

Alexander's convictions on obscenity counts may serve as a predicate to a RICO violation, and do not constitute a prior restraint. The First Amendment is not violated when there is a nexus established between the ill-gotten gains from racketeering activity and the protected materials forfeited. *Pryba*, 900 F.2d at 755.

Here, the RICO forfeiture provisions constitute a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities. Courts have recognized the substantial difference

⁹ The district court rejected Alexander's facial challenge to the application of the RICO forfeiture provisions in *United States v. Alexander*, 736 F.Supp. 968, 977-80 (D.Minn. 1990).

between prior restraints and criminal penalties. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 & n. 2, 106 S.Ct. 3172, 3176-77 & n. 2, 92 L.Ed.2d 568 (1986); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246-47, 43 L.Ed.2d 448 (1975); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-45, 77 S.Ct. 1325, 1327-28, 1 L.Ed.2d 1469 (1957).

Alexander next argues that the forfeiture imposes an unconstitutional chilling effect on protected expression. The Supreme Court has directly addressed the chilling effect from the application of the RICO forfeiture provisions to obscenity offenses and to first amendment protected materials:

It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means . . . that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents.

Fort Wayne Books, 489 U.S. at 60, 109 S.Ct. at 925 (citing *Smith v. California*, 361 U.S. 147, 154-55, 80 S.Ct. 215, 219-20, 4 L.Ed.2d 205 (1959)).

We reject Alexander's argument that the forfeiture provisions have an unconstitutionally chilling effect on first amendment rights.

We also reject Alexander's argument that the reach of the RICO forfeiture provisions is unconstitutionally overbroad. In *Arcara*, the Supreme Court upheld the closure of a bookstore that had been used as a front for prostitution. The Court stated that criminal and civil sanctions are not subject to "least restrictive means scrutiny" because a particular remedy "will have some effect on the First Amendment activities of those subject to sanction." 478 U.S. at 706, 106 S.Ct. at 3177.

Here, the court specifically and properly limited the forfeiture to profits, real estate, and businesses directly related to Alexander's interstate transportation and sale of obscene magazines and videos. The forfeiture is not unconstitutionally overbroad.¹⁰

VI.

Alexander argues that his sentence, primarily the forfeiture order, violates the eighth amendment prohibition against cruel and unusual punishments and excessive fines.

¹⁰ Alexander also argues that the court should have applied a remedy requiring forfeiture of proceeds which were proportional or traceable to the sale of obscene material. There is, however, no requirement that courts engage in such a test in applying the RICO forfeiture provisions. See, e.g., *United States v. Regan*, 858 F.2d 115, 119 (2d Cir.1988); *United States v. Kravitz*, 738 F.2d 102, 104-05 (3d Cir. 1984), cert. denied, 470 U.S. 1052, 105 S.Ct. 1752, 84 L.Ed.2d 816 (1985).

The Supreme Court has set forth a three-part test for determining whether a sentence violates the eighth amendment. The test requires a comparison of: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed for the same or similar offenses in the same jurisdiction; and (3) the sentences imposed for the same or similar offenses in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 290-92, 103 S.Ct. 3001, 3009-11, 77 L.Ed.2d 637 (1983).

A sentence imposed is entitled to "substantial deference" and we may only consider "whether the sentence . . . is within the constitutional limits." *Solem*, 463 U.S. at 290 and n. 16, 103 S.Ct. at 3009 and n. 16.

The district court imposed Alexander's prison sentence based on the Sentencing guidelines. 28 U.S.C. § 994 (1988). Alexander does not specifically attack his prison sentence. Instead, he appeals from the forfeiture order arguing once again that the income "from the two patterns of racketeering amoun[t] only to an infinitesimal percentage of his legitimate income," and that when the forfeiture is combined with the fine and prison sentence, the "harshness" of the penalty is "amazingly unfair."

Alexander cites one decision in which the Ninth Circuit remanded the case for a determination of whether the forfeiture was grossly disproportionate or excessive, *United States v. Busher*, 817 F.2d 1409, 1414-16 (9th Cir.1987), and contends that this case should be followed here.

Nevertheless, in the only other RICO-obscenity case in the country, the Fourth Circuit held that the forfeiture of a business with total annual sales of \$2 million as a

result of \$105.30 of material found to be obscene did not constitute a cruel and unusual punishment or an excessive fine prohibited by the eighth amendment. *Pryba*, 900 F.2d at 753, 756-57. The Fourth Circuit added that it was not even required to conduct a proportionality review because the defendants did not receive a sentence of sufficient severity. *Id.* at 757 (citing *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.), cert. denied, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir.1985), cert. denied, 476 U.S. 1182, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986)). "*Solem v. Helm* does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole." *Pryba*, 900 F.2d at 757 (citation omitted). We cannot conclude that the district court abused its discretion in sentencing Alexander.

VII.

Finally, Alexander argues that the evidence was insufficient to support his convictions on the tax counts, social security counts, and all other counts. He adds in his reply brief that the evidence was insufficient to support his RICO convictions, arguing that the government failed to show that proceeds from a pattern of racketeering activity were invested in a criminal enterprise, or a criminal enterprise existed as required by 18 U.S.C. § 1962. We have carefully reviewed Alexander's arguments and record at trial. We are satisfied that there is ample evidence to support Alexander's convictions on all counts.

Having carefully considered all of Alexander's arguments, we affirm Alexander's convictions, and the orders of forfeiture and summary judgment.

APPENDIX B
UNITED STATES of America
v.

Ferris ALEXANDER, et al.

Crim. No. 4-89-85(1).

United States District Court,
D. Minnesota,
Fourth Division.

Jan. 24, 1990.

ORDER

ROSENBAUM, District Judge.

This matter is before the Court pursuant to objections made to a Report and Recommendation and an accompanying Pretrial Order each issued on September 30, 1989, by the Honorable Janice M. Symchych, United States Magistrate. Magistrate Symchych's recommendations and order are appended hereto. Also before the Court are defendants' objections to a Report and Recommendation issued by the Honorable Patrick J. McNulty, United States Magistrate, dated November 29, 1989. This recommendation is also appended hereto.

In reviewing a report and recommendation, the Court must consider the arguments and evidence, *de novo*. 28 U.S.C. § 636(b)(1); Rule 72(b), Federal Rules of Civil Procedure (Fed.R.Civ.P.); Local Rule 16(C)(2). After review of the Reports and Recommendations, the Court adopts each magistrate's reasoning and holdings, except Magistrate Symchych's recommendations 1, 2, 4, and 5.

In parts 1, 2, 4, and 5, Magistrate Symchych recommended that the Court find the RICO pretrial Restraining Order and consequent post-conviction forfeiture provisions, each pursuant to 18 U.S.C. § 1963 (§ 1963), unconstitutional, both facially and as applied. The magistrate found these provisions to be unconstitutionally overbroad and unconstitutional prior restraints. The magistrate, however, recommended against dismissing Counts VI, VII, and VIII.

The magistrate examined the language and scope of § 1963 and particularly examined this Court's Restraining Order, dated May 30, 1989. The order in question was issued upon the grand jury's return of the indictment herein. The relevant substance of the Restraining Order will be set forth below. In her review of the Restraining Order, the magistrate focused on its *ex parte* nature, its recordkeeping requirements, and its probable impact on the sale or distribution of protected materials. The magistrate then considered the same factors as they are implicated by RICO's forfeiture provisions. After her analysis, she also recommended that the Court find RICO's forfeiture provisions facially overbroad and a prior restraint.

The magistrate further urged the Court to strike these forfeiture provisions as applied. Noting the indictment identifies property which is to be forfeit in the event of conviction, she found the forfeiture sections of the indictment to be overly broad, encompassing "multiple bookstores, theatres, and videotape rental establishments," at least some of which, she determined, were presumptively protected by the first amendment. *Id.* at 13.

The government objects to these portions of the Report and Recommendation, arguing RICO is intended to provide powerful penalties, including forfeiture, to those engaged in racketeering activity. The United States then asserts that the nature of the RICO offense – be it narcotics, arson, extortion, or obscenity – is of no moment. The government further suggests RICO's forfeiture and restraining provisions are *in personam* and limited to interests in property acquired, maintained, or used in the actual violation of the RICO statute. As such the government claims RICO's forfeiture provisions are not overbroad, even in the obscenity context. The government concludes:

it is not the fact that the property is a bookstore, that triggers the forfeiture provision, but rather it is the owner's use of the property to conduct his illegal activity (the nexus) that brings the property within the ambit of the penalty provisions.

Government's Memorandum, p. 9 (citations omitted).

On the question of prior restraint, the government focuses upon the distinction between unlawful prior censorship and legitimate post-trial punishment. The government cites the language of *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), in support of the difference it perceives:

[if] the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical in the future

then the statute constitutes a prior restraint. *Id.* at 711, 51 S.Ct. at 629. The government urges rejection of the magistrate's recommendation to strike the Restraining Order.

For their part, defendants support the magistrate's Report and Recommendation. Indeed, they argue her recommendation is too narrow. They point to *Near's* prescription of prior restraints and to subsequent cases rejecting attempts to punish obscenity by means of restraint "considerably less drastic than the outright forfeitures imposed by RICO."¹ Defendants also raise the spectre of differing community standards. They stress the possibility that an obscenity conviction in one community could lead to forfeitures in another community espousing completely different values.

Analysis

I. The Restraining Order

The magistrate recommends lifting the Restraining Order on the grounds of unconstitutional overbreadth and prior restraint, finding the authorizing statute unconstitutional on its face and as applied. The Court addresses each of these issues separately.

¹ Defendants cite *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir.1983); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir.1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Genusa v. City of Peoria*, 475 F.Supp. 1199, 1207-09 (C.D.Ill.1979), modified, 619 F.2d 1203, 1217-20 (7th Cir.1980).

A. Facial Challenge to 18 U.S.C. § 1963(d)

1. Overbreadth

A statute is overbroad if it unconstitutionally infringes upon free speech while regulating another activity. In other words, a statute is overbroad "if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). A law which arguably diminishes access to constitutionally protected materials is subject to first amendment overbreadth scrutiny. See *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1391-92 (8th Cir. 1985).

The Court recognizes that invocation of the overbreadth doctrine is "strong medicine," which should be utilized "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)). In considering a facial challenge to a Congressional enactment, the Court is mindful that it must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); See *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). The Court must determine if there exists a constitutional interpretation of the statute which is consistent with Congress' intent. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 370-75, 91 S.Ct. 1400, 1405-07, 28 L.Ed.2d 822 (1971).

Clearly, some RICO pretrial restraining orders have no free speech implications whatsoever. Under 18 U.S.C. § 1963(d), restraints on property associated with RICO gambling, arson, extortion, or narcotics charges would not normally implicate the first amendment. Similarly, in the obscenity context, an order can be narrowly crafted to reach only those items which the grand jury has found probable cause to believe are obscene.²

The Court is confident that judges issuing pretrial restraining orders, pursuant to 18 U.S.C. § 1963(d), will seek to do so in a manner consistent with the Constitution. This assurance has been held sufficient to deny facial overbreadth challenges to statutes on first amendment grounds. See *Ferber*, 458 U.S. at 773, 102 S.Ct. at 3363. The Court, therefore, declines to adopt the magistrate's recommendation holding 18 U.S.C. § 1963(d) facially unconstitutional in RICO prosecutions founded on obscenity offenses. The Court concludes that such pretrial restraining orders must be reviewed on a case-by-case basis. See *American Library Assoc. v. Thornburgh*, 713 F.Supp. 469, 486 (D.D.C.1989). See generally *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, ___, 109 S.Ct. 916, 927-28, 103 L.Ed.2d 34 (1989).

² Whether these objects are ultimately forfeitable, pursuant to 18 U.S.C. § 1963(a)-(c), (e), is an entirely different question, dependent upon a jury's verdict that the property was obtained, used, or maintained in connection with the RICO violation beyond a reasonable doubt. *United States v. Pryba*, 674 F.Supp. 1518, 1521 (E.D.Va.1987).

2. Prior Restraint

Near and its progeny counsel that any future restraint of speech, because of past or anticipated content, is a prior restraint. *Near*, 283 U.S. at 707-15, 51 S.Ct. at 628-30; see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554-56, 95 S.Ct. 1239, 1244-45, 43 L.Ed.2d 448 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57-60, 85 S.Ct. 734, 738-39, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-72, 83 S.Ct. 631, 639-40, 9 L.Ed.2d 584 (1963). Clearly, "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc.*, 372 U.S. at 70, 83 S.Ct. at 639.

Yet, not all prior restraints are impermissible. *Near*, 283 U.S. at 216, 51 S.Ct. at 631; *Southeastern Promotions, Ltd.*, 420 U.S. at 558, 95 S.Ct. at 1246. The cases make clear, however, that particular judicial safeguards and procedures must be followed before a prior restraint may be imposed. *Southeastern Promotions, Ltd.*, 420 U.S. at 559-60, 95 S.Ct. at 1247; *Freedman*, 380 U.S. at 58, 85 S.Ct. at 739.

An *ex parte* pretrial order or injunction presents particular prior restraint difficulties. Under such an order a defendant is required to "obey [the order] . . . pending review of its merits and . . . [is] subject to contempt proceedings" if he fails to do so. *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 319, 100 S.Ct. 1156, 1161, 63 L.Ed.2d 413 (1980). An *ex parte* pretrial order directed at a bookseller, at least some of whose wares have not been found obscene by a grand jury, raises grave constitutional

questions. The Supreme Court could have been speaking of this threat when it said:

Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship - reflecting the natural distaste of a free people - is deep written in our law.

Southeastern Promotions, Ltd., 420 U.S. at 553, 95 S.Ct. at 1244.

This Court has recently rejected a facial challenge, albeit in a declaratory judgment action context, to the pretrial restraint provisions of 18 U.S.C. § 1963(d). *Alexander v. Thornburgh*, 713 F.Supp. 1278, 1292-93 (D.Minn.1989). Judge Doty reasoned that some pretrial restraining or seizure orders could certainly be unconstitutional in nature. *Id.* at 1292. He concluded, however, that "[t]he mere fact that § 1963 may be applied in a manner that results in an unconstitutional prior restraint does not render that section unconstitutional on its face." *Id.* at 1292.

This Court agrees that the mere possibility of a statutory restraint and a consequent penalty for trafficking in obscenity does not impermissibly chill the exercise of first amendment rights. Nor does the mere potential for statute-driven self-censorship comprise a constitutional infirmity. *Fort Wayne Books*, 489 U.S. at ___, 109 S.Ct. at 926. Indeed, "[t]hose who conduct their affairs close to the

boundaries of proscribed activity necessarily incur some risks." *Polykoff v. Collins*, 816 F.2d 1326, 1340 (9th Cir.1987). Proper, and properly chilling, penalties for obscenity, including fines, incarceration, and other criminal sanctions, have frequently been upheld. See *Fort Wayne Books*, 489 U.S. at ___ n. 4, 109 S.Ct. at 922 n. 4 (and cases cited therein); *Polykoff*, 816 F.2d at 1336-40; 511 *Detroit St. v. Kelley*, 807 F.2d 1293, 1298 (6th Cir.1986), cert. denied, 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698 (1987).

For these reasons, this Court finds that § 1963's pretrial restraining order authority, standing alone, is not facially unconstitutional as a prior restraint. See generally *Alexander*, 713 F.Supp. at 1290-1291.

B. The Restraining Order, as Applied

The magistrate, after recommending invalidation of 18 U.S.C. § 1963(d) on its face, recommended that this Court strike the May 30, 1989, Restraining Order, as issued, on first amendment grounds.

In *Fort Wayne Books*, the Supreme Court emphasized procedural safeguards which must be followed prior to the seizure of obscene materials. *Fort Wayne Books*, 489 U.S. at ___, 109 S.Ct. at 927 (citing *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)). A seizure is permitted only if a "procedure 'designed to focus searchingly on the question of obscenity' " is present. *Id.* at ___, 109 S.Ct. at 927 (quoting *Quantity of Books v. Kansas*, 378 U.S. 205, 210, 84 S.Ct. 1723, 1725, 12 L.Ed.2d 809 (1964)). The Supreme Court held:

[w]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.

Id. at ___, 109 S.Ct. at 927.

The magistrate correctly noted that the Restraining Order differs significantly from that imposed in *Fort Wayne Books*. Report and Recommendation, at 14. Notably, with the exception of those items seized pursuant to search warrant, there has been no actual seizure of expressive materials. The Restraining Order does not proscribe continued traffic in the specific items which have been charged as obscene in the indictment. The only items detained were those seized pursuant to warrant and held for evidence. Their duplicates, presumably, remain for sale or rental on defendants' shelves and racks. The magistrate found, however, that the present order could be characterized as generally freezing all of defendants' property and assets. *Id.* at 14-16.

All parties agree that under the terms of the Restraining Order, defendants have continued to conduct their businesses – businesses they contend are almost exclusively engaged in the dissemination of first amendment protected materials. Nothing has been presented to suggest that defendants have been significantly hampered in the orderly conduct of these enterprises. The Court, however, must examine each aspect of the imposed order to determine its validity in the face of the overbreadth and prior restraint challenges.

1. Inalienability of Property and Interests in Property

The Restraining Order prohibits the defendants from the sale or transfer of identified real estate, personal property, and various interests in property, absent approval of the Court. Restraining Order, ¶¶ 5, 6(b)-(d). For purposes of this analysis, the Court assumes that some of these property interests may have been secured, maintained, or derived from the sale of obscene materials.³ With the exception of the Court's restraint on alienability, defendants maintain their day-to-day interests in the property and have regular control over its use.

a. Overbreadth

The Restraining Order, as imposed, clearly reaches beyond the scope of allegedly obscene materials. The order covers real estate, intangible interests in property, and personal property, including "video cassettes, magazines, [and] other printed materials." Taken as a whole, this property is inextricably bound to defendants' ability to exercise first amendment rights. The order, however, explicitly permits continuation of defendants' ordinary course of business.⁴ Restraining Order, ¶ 5. The order, as

³ This assumption is in no regard tantamount to a holding in this regard. For forfeiture purposes, the government must prove the nexus between the property and the materials beyond a reasonable doubt. *Pryba*, 674 F.Supp. at 1521.

⁴ Ordinary course of business is defined in the order as: the following types of expenditures and transactions, made by the defendants directly or by and through

(Continued on following page)

fashioned, grants to defendants the use of the property in all respects save atypical transfers or sales.

(Continued from previous page)

A B Distributors, or Video Hits, Controlled Entities, if such expenditures and transactions are made in the ordinary course of business of the defendants:

- (a) purchase of inventory, supplies and equipment in an arm's length transaction;
- (b) payment of business liabilities including but not limited to accounts payable, mortgage and contract for deed payments, insurance premiums, license fees, utilities and taxes which existed at the time of the signing of this order and which arise hereafter;
- (c) ordinary use of supplies and equipment;
- (d) payment of reasonable business salaries not to exceed \$1,000 per week gross for any of the defendants;
- (e) payment, pursuant to an arm's length transaction, for the normal and average upkeep or maintenance of any real property, equipment or furnishings necessary for ordinary business operations;
- (f) currency transactions including deposits and bank transfers of funds from the accounts of the Controlled Entities into the business account to be established in accordance with this Order as directed below;
- (g) payment of reasonable attorney fees and expenses;
- (h) payment of ordinary living expenses upon application by the defendants in accordance with paragraph 12 of this Order.

Post-indictment Restraining Order, ¶ 1.

In this same regard, the order does not absolutely proscribe the sale or transfer of real estate, personal property, or holdings. Such transactions may be consummated with Court approval, which approval has been granted in one instance. *See Order*, dated June 29, 1989. In light of actual experience, therefore, the court finds that this aspect of the order does not impermissibly impinge upon defendants' personal exercise of free speech. Further, the order contains no provision forbidding the acquisition of new property which might, itself, be used in the exercise of free speech rights. Although the Restraining Order does extend beyond allegedly obscene materials, the Court finds that it does not burden those materials in a fashion which renders it constitutionally overbroad.

b. Prior Restraint

As set forth above, the Restraining Order imposes control over, rather than seizure of, property. Had the order called for the seizure of property, it may well have run afoul of the rule in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. at ___, 109 S.Ct. at 928-29. Aside from those few items seized for evidence pursuant to warrant, the remaining books, films, and videotapes have remained on defendants' property and available for purchase. *Id.* at ___, 109 S.Ct. at 929. Although the Restraining Order necessarily arises out of defendants' past speech, the proscription upon sale or transfer of defendants' real estate or the personal property contained therein does not impact upon defendants' future speech

or communication. See *Near*, 283 U.S. at 706, 51 S.Ct. at 627.

Certain of the property touched by the order, including noncommercial and purely personal property, plays no part in defendants' exercise of first amendment rights. As such, these items do not implicate the first amendment.

2. Performance Bond

The order permits defendants to offer a performance bond in lieu of compliance with its terms. Restraining Order, ¶ 11. No such bond has been posted nor has any party challenged the provision. Therefore, the Court declines to offer any opinion as to the propriety of such a bond.

3. Bank Accounts

Paragraph 6(a) of the restraining order forbids the transfer, sale, or concealment of:

all money, stock certificates, property or other interest in any account, certificate or safe deposit box maintained at any main or branch office of the following financial institutions and other partnerships and other corporations, including but not limited to officers at the addresses listed herein.

This restriction is subject to the provision permitting routine transactions in the ordinary course of defendants' businesses. Restraining Order. ¶¶ 1 and 5.

a. Overbreadth

The Restraining Order reaches all funds in designated institutions and, therefore, potentially touches defendants' ability to acquire and sell protected materials. But the Court finds that the "ordinary course" provision saves the order from constitutional flaw. Books, magazines, videotapes, and films may continue to be purchased, stocked, and sold as in the past. Auxiliary property necessary for the dissemination of those goods may also be obtained. Further, there is a provision for major transactions out of the ordinary course, upon approval of the Court. As such, the order maintains the status quo. It is not impermissibly overbroad since defendants' constitutional right to free speech are unimpeded. The Restraining Order preserves that state of affairs which allows defendants to vend protected materials.

b. Prior Restraint

The same "ordinary course" provision undercuts any prior restraint argument. Had the right to use funds been restrained, defendants' ability to carry on their protected speech activities would have been significantly impeded – a result clearly at odds with the first amendment. See *Fort Wayne Books*, 489 U.S. at ___, 109 S.Ct. at 928-29. But this has not occurred. Under these circumstances, the Court declines to strike § 1963, a provision which, on its face and in fact, permits defendants to carry on their regular business activity. The ordinary course provisions are not content based. Defendants are free to garner such

inventory as they choose and dispose of it as they see fit consistent with their prior business practices.

4. Recordkeeping

Paragraph four of the post-indictment restraining order mandates that:

All transactions . . . shall be recorded pursuant to generally accepted accounting principles and shall be evidenced by cash register slips, sales receipt journal, bank deposits, numerical invoices and order forms, disbursements, journal, checks, computer printouts, inventory lists, and any other ordinary business record. The defendants shall not use cashier's checks, money orders, or drafts to pay for any of the ordinary business transactions or personal expenses allowed herein or use said instruments for the purpose of transferring funds. All records and documents regarding the defendants' business transactions shall be maintained and provided to the government on a weekly basis.

Restraining Order, at ¶ 4.

The Court has approved, above, the portions of the order permitting defendants to proceed with activities in the ordinary course of business. Paragraph four simply records those transactions in an orderly fashion. This does not contravene the first amendment either for overbreadth or on the basis of prior restraint.

a. Overbreadth

Statutes which are overbroad, in a first amendment context, limit access to, or availability of, protected materials. *Upper Midwest Booksellers*, 780 F.2d at 1391. Mandatory recordkeeping has been subjected to overbreadth scrutiny. In *American Library Association v. Thornburgh*, 713 F.Supp. 469 (D.D.C.1989), the district court struck imposed recordkeeping in the context of the Child Protection and Obscenity Enforcement Act, 18 U.S.C. § 2257. The district court held that broad recordkeeping, which required movie producers to record the names and ages of all actors and actresses in their movies, was overbroad and impinged upon the producer's ability to make otherwise protected motion pictures. *Id.* at 477-79. The district court examined whether the recordkeeping demands were "tailored precisely" to the evil of child pornography or whether they infringed, prohibited, or otherwise hindered the dissemination of free speech. *Id.* at 479.

The recordkeeping provision here does not suffer from the same infirmities. The recordkeeping requirements are neither as demanding nor as broad as those stricken in *American Library Association*. Regular financial records are kept in the ordinary course of almost any business. The order does not require defendants to undertake any extensive procedure to comply. In the absence of any significant problems, none of which have been brought to the Court's attention, there does not appear to be sufficient impact upon freedom of speech to warrant the relief provided in *American Library Association*.

The recordkeeping, moreover, is "tailored precisely" to the evil sanctioned by the RICO obscenity charges. See

id. at 479. The requirement simply permits the tracing of property which the grand jury asserts to be potentially forfeitable. Other than requiring order and regularity in financial transactions, the burden is minimal and does not invalidate this portion of the order.

b. *Prior Restraint*

The recordkeeping aspect of the Restraining Order is a prior restraint in only the most remote sense. The weekly reporting requirement – certainly not an ordinary business practice – potentially detracts from defendants' available time and funds which might otherwise be available for protected speech. Yet, the order merely calls for defendants to turn over records on a weekly basis. There is no evidence of any significant burden on defendants' businesses arising out of this procedure. Although defendants may experience some minor inconvenience complying with paragraph four, the Court declines to declare that inconvenience to be of constitutional dimension.

5. One Bank Account

Paragraph eight of the Restraining Order states:

All income from any source received directly or indirectly by the defendants Ferris Jacob Alexander, Dolores Alexander and Jeffrey Alexander, their agents or assigns, and by or through any of the Controlled Entities, corporations or partnerships in the ordinary course of business as defined above shall be placed in one checking account located at The Union Bank and Trust, 312 Central Avenue Southeast, Minneapolis,

Minnesota and all expenses paid in the ordinary course of business as defined above including but not limited to employee salaries, inventory, supplies, utilities, rent, mortgage or contract for deed payments, insurance premiums, taxes and general overhead shall be paid out of said account.

a. *Overbreadth*

For many of the same reasons just discussed, this requirement is not impermissibly overbroad. The requirement is something of a burden merely because it is unusual. In addition, certain of the controlled entities are located outside the Twin Cities metropolitan area.

The rationale underlying the provision and its actual effect mitigate against a finding of unconstitutional overbreadth. The requirement clearly provides a benefit in terms of simplicity: all of defendants' transactions, since the date of the Restraining Order, are conducted through one account. The only restriction on use of the funds is that such use be in the ordinary course of business. There is no proscription on the accession, maintenance, or sale of any item whatsoever. In the absence of any content-based restriction, this is not an impermissibly overbroad requirement.

b. *Prior Restraint*

Since defendants' funds remain available for acquisition and dissemination of arguably protected material, the Court finds the single bank account requirement is

not a prior restraint. The fact that some of defendants' businesses are located at a distance from the Union Bank and Trust may incidentally complicate some transactions. See *American Library Association v. Thornburgh*, 713 F.Supp. at 477-79 (extensive investigative and traveling requirements may impermissibly infringement upon the exercise of protected speech). Common sense suggests, however, that many difficulties may be overcome through regular mail or telephonic correspondence. But in the absence of evidence of such difficulties, and none have been shown thus far, the operant fact remains defendants' unrestricted access to funds regularly used to purchase and sell their wares. Defendants have expressed no difficulties in conducting business operations out of one account, and the Court stands ready to consider any adjustments which may be appropriate. Upon the information before the Court, however, paragraph eight is constitutionally sound.

6. Monitoring

Paragraph nine of the restraining order provides:

The Federal Government shall designate an individual with business and accounting experience to monitor the operations of the Controlled Entities as well as of the defendants' financial affairs to ensure that the assets of said entities and persons are not dissipated or wasted in violation of this order. Said monitoring shall include but not be limited to a twice monthly review of the books and records of the Controlled Entities and the defendants. The designated individual shall be compensated by the

defendants as an expense in the ordinary course of business.

Restraining Order, ¶ 9.

This provision has not been implemented. In the absence of any implementation, the Court expresses no thoughts on its legality.

Having examined each aspect of the Restraining Order, the Court concludes that the limitations placed on defendants' property pass constitutional muster. The Court, therefore, declines to adopt the magistrate's recommendation to lift the Restraining Order.

II. Post-trial Forfeiture

The magistrate recommended that the Court declare 18 U.S.C. § 1963(a)-(c), (e), RICO's post-trial forfeiture provisions, unconstitutional both facially and as applied. She concluded the provisions were overbroad and a prior restraint. Again, the Court addresses each question individually.

A. Facial Challenge

In *Fort Wayne Books*, the Supreme Court declined to assess the constitutionality of the Indiana RICO statute's post-trial forfeiture section in an obscenity context.⁵

⁵ The Court specifically bypassed the question: for the purpose of disposing of this case, we assume without deciding that bookstores and their contents

(Continued on following page)

Similarly, Judge Doty did not reach the issue.⁶ *Alexander v. Thornburgh*, 713 F.Supp. at 1294. At least one district court, however, has upheld the constitutionality of the forfeiture provision in the face of a prior restraint challenge. *United States v. Pryba*, 674 F.Supp. 1504, 1512 (E.D.Va.1987).

1. Overbreadth

Defendants claim RICO's forfeiture provisions are overbroad since property, some of it clearly protected literature or video tapes, may be subject to seizure. Defendants contend this impermissibly infringes upon constitutionally protected expression.⁷

(Continued from previous page)

are forfeitable (like other property such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

Fort Wayne Books, 489 U.S. at ___, 109 S.Ct. at 928 (footnote omitted).

⁶ The Court stated:

This Court finds that the present action for declaratory and injunctive relief also does not present the opportunity to determine whether RICO's forfeiture provision is unconstitutional as a prior restraint when the property forfeited consists of a defendant's entire interest in an enterprise which sells materials presumptively protected by the first amendment.

Alexander v. Thornburgh, 713 F.Supp. 1278, 1294 (D.Minn.1989).

⁷ As a threshold matter, the Court rejects defendants' suggestion that the § 1963 language is unacceptably vague as

(Continued on following page)

The broad language of RICO's forfeiture provision and the consequent penalties do not impermissibly chill future expression. The Supreme Court, addressing this issue in *Fort Wayne Books'* pretrial restraining order, noted:

It may be true that the stiff[] RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means . . . that some cautious booksellers will practice self-censorship and remove first amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of . . . obscenity laws and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

For Wayne Books, 489 U.S. at ___, 109 S.Ct. at 925 (quoting *Smith v. California*, 361 U.S. 147, 154-55, 80 S.Ct. 215,

(Continued from previous page)

written. The Court finds the RICO forfeiture language sufficiently concise to pass constitutional muster. Absolute precision is not constitutionally mandated. See *Pryba*, 674 F.Supp. at 1511.

That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold . . . language too ambiguous to define a criminal offense.

Roth v. United States, 354 U.S. 476, 491-92, 77 S.Ct. 1304, 1313, 1 L.Ed.2d 1498 (1957).

219-20, 4 L.Ed.2d 205 (1959)). As noted previously, courts have recognized that individuals and entities conducting their businesses near the edge of proscribed activity necessarily undertake some risks. *Polykoff*, 816 F.2d at 1340. The Court, therefore, rejects the defendants' suggestion that RICO's forfeiture language is impermissibly threatening.

Substantively, defendants claim that RICO's forfeiture provisions exact penalties of disproportionate size. Clearly, a forfeiture is a penalty, requiring one who has been convicted to disgorge that which has been accumulated. Under RICO, it is a special penalty in that the items to be surrendered must actually have been used in, or derived from, the RICO pattern of violations. 18 U.S.C. § 1963(a)-(c), (e). Such a penalty is analogous to statutory penalties which are indisputably permissible. Certainly, the imposition of a fine following a conviction has been approved, even when the fine is greater than any traceable amount of illegally garnered assets. *Polykoff*, 816 F.2d at 1339; 511 *Detroit*, 807 F.2d at 1299; see *Alexander*, 713 F.Supp. at 1289.

More importantly, RICO guarantees an equivalence between the forfeiture of assets and the criminal acts Congress sought to proscribe when it passed RICO: that which is to be given up in forfeit is the product and profit of the RICO offense. In other words, property or assets garnered as a result of proscribed activity is that which is to be surrendered as a partial penalty. The fairness of this scheme is assured by the fact that a jury must call for its surrender upon proof beyond a reasonable doubt. *Pryba*, 674 F.Supp. at 1521.

Of course, even in the absence of any forfeiture, the same funds and assets could be lost to defendants pursuant to the general fine statute.⁸ The issue is that each penalty, whether fine or forfeiture, may possibly deprive defendants of the means to continue disseminating protected materials – and the public could lose access to items which are in no way illegal or obscene.⁹

Realistically, bookstores, theaters, and places of public discourse have faced regulation and possible seizure before. While the issue has never been squarely addressed, it does not appear that closures based upon a fire code violation or health hazard would present problems of overbreadth. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-07, 106 S.Ct. 3172, 3176-77, 92 L.Ed.2d 568 (1986). Similarly, the indictment before the Court charges a tax violation which, if upheld after trial, could call for substantial payment of amounts owing. The taxes and penalties, as well as any fine amount, could touch on protected assets in the event of seizure or sale.

The Court is disinclined to strike a statutory penalty, which may otherwise be lawfully imposed, simply because defendants have been charged with violating the

⁸ 18 U.S.C. § 3571(b)(3) contemplates a fine of \$250,000 per felony conviction. See 18 U.S.C. § 1963. There are 48 counts in this indictment.

⁹ The magistrate concluded the fine and forfeiture penalties were distinct on the basis that forfeiture could encompass vast holdings of a defendant unrelated to the criminal activity. The Court does not deem the distinction to be significant. A fine exceeding \$1,000,000 – certainly a possibility here – could, in all likelihood, touch upon a significant portion of defendants' assets, some of them non-expressive.

RICO obscenity provisions or because the res to be surrendered has a speech or first amendment flavor. It is clear that the Supreme Court has found obscenity to be without first amendment protection. See *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Some publications or video materials may fall on one side or the other of the protected speech/proscribed obscenity line. But the law defines a point over which one travels at his hazard. The mere fact that there is a penalty for going beyond that point does not bar a dollar penalty, either by fine or forfeiture.

2. Prior Restraint

For many of the same reasons, the forfeiture provisions of 18 U.S.C. § 1963(a)-(c), (e) do not impermissibly restrain free speech. Unlike administrative actions, such as movie censorship, *Freedman*, 380 U.S. at 58, 85 S.Ct. at 738-39, and license revocation, *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 470 (6th Cir.), cert. denied, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986), which may not be undertaken without procedural safeguards, RICO's forfeiture is only possible after a full trial. At trial, the jury must find, beyond a reasonable doubt, that the property to be forfeited was connected to the illegal activity. *Pryba*, 674 F.Supp. at 1521.

In the same sense that a dollar fine presents no prior restraint problems, *Polykoff*, 816 F.2d at 1338, and 511 *Detroit St., Inc.*, 807 F.2d at 1298, the forfeiture of assets does not impermissibly hamper defendants' ability to

speak in the future.¹⁰ As above, a fine can lawfully be imposed in an amount far beyond a defendant's assets. Under RICO, and the companion tax charge in this indictment, the defendants face substantial fines. The possibility of dollar loss, then, will be present even in the absence of forfeiture. Any penalty, by fine or forfeiture, is imposed only after trial and not before. "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law [rather] than to throttle them and all others beforehand." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. at 558-59, 95 S.Ct. at 1246-47

¹⁰ One cannot claim that the possibility of substantial fine or forfeiture is a deprivation of the right to speak freely:

this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Cf. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1977). Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders. See *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); see also *Jones v. North Carolina Prisoners Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977).

Arcara v. Cloud Books, Inc., 478 U.S. 697, 699, 106 S.Ct. 3172, 3177, 92 L.Ed.2d 568 (1986).

(emphasis original). This policy is completely consistent with *Near* and its progeny.¹¹

Post conviction forfeiture necessarily deprives a defendant of assets garnered in the past. There is no necessary impact on expressive activity in the future. *American Library Association*, 713 F.Supp. at 486.

The fact that criminal punishment – whether it is by fine, incarceration, etc. – makes it physically difficult for the person to engage in First Amendment activity does not make the punishment unlawful “prior restraint,” as long as the person legally is unrestrained to engage in speech.

Id. at 486 n. 21. Deterrence is a goal of RICO, and forfeiture plays a role in that objective. This chill, if it is that at all, is a “legitimate consequence of the RICO forfeiture provisions or any other criminal penalty.” *Pryba*, 674 F.Supp. at 1512.

Defendants object to the RICO forfeiture penalties. In their view, obscenity simply cannot be made a crime without jeopardizing first amendment freedoms. Defendants confuse sincerity of belief with adherence to the rule of law. This way lies anarchy. The Supreme Court has held that obscenity may be criminalized consistent with our Constitution. *See, e.g., Ferber*, 458 U.S. at 764-65, 102 S.Ct. at 3358; *Smith v. United States*, 431 U.S. 291, 304-05, 97 S.Ct. 1756, 1765-66, 52 L.Ed.2d 324 (1977); *Miller*, 413

¹¹ “Liberty of speech and of the press is . . . not an absolute right, and the state may punish its abuse.” *Near v. Minnesota*, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357 (1931).

U.S. at 23-24, 93 S.Ct. at 2614-15. As such, this court, and the law, treats an obscenity charge the same as any other criminal charge, be it bank robbery, narcotics trafficking, or firearm violations. Were a defendant to be convicted of operating a drug ring out of a bookstore, the first amendment would not prevent seizure of that store, if the requisite nexus was proven. This Court will follow the law, and declines the invitation to strike RICO forfeiture provisions in an obscenity case as a prior restraint.

B. *As Applied Challenge*

The Court, therefore, concludes that, on its face, § 1963 forfeiture may be imposed, in an obscenity context, consistent with the Constitution. The actual forfeiture of property, however, has yet to take place. Defendants’ first line of defense is the jury. Until the jury renders its verdict, the Court will refrain from rendering a decision on this forfeiture, as applied.

Accordingly, the Court adopts the Report and Recommendation dated September 30, 1989, in all respects except parts 1, 2, 4, and 5. As to those parts, defendants’ motion to hold the forfeiture and restraining order provisions of 18 U.S.C. § 1963 unconstitutional is denied. Defendants’ motion to strike the Restraining Order of May 30, 1989, and the forfeiture provisions of the indictment is also denied.

The Court adopts in full the Report and Recommendation issued by the Honorable Patrick J. McNulty, dated November 29, 1989.

Having considered the magistrates' Reports and Recommendations, the Court now turns to Magistrate Symchych's Pretrial Order issued September 30, 1989. Defendants individually or collectively object to parts 4, 6, 9, and 12 of the order. The government objects to parts 4, 12, and 15.

Unlike a report and recommendation, a magistrate's order may be disturbed by this Court only upon a showing that the order was clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Rule 72(a) Federal Rules of Civil Procedure; Local Rule 16(B)(2). Based upon a review of the record, with this standard in mind, the Court affirms the order dated September 30, 1989, except as to paragraph 12, and modifies paragraph 15 to clarify the government's responsibility.

In part 12 of her order, the magistrate granted defendants' motion for early disclosure of Jencks Act, 18 U.S.C. § 3500, materials, requiring such production "10 calendar days prior to trial." The Court finds the magistrate's order is contrary to law. 28 U.S.C. § 636(b)(1)(A); Rule 72(a), Federal Rules of Civil Procedure; Local Rule 16(B)(2).

Rule 16(a)(2), Federal Rules of Criminal Procedure, specifically excludes statements made by government witnesses from pretrial discovery, except as provided in the Jencks Act. The Jencks Act states in relevant part:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena [sic], discovery, or

inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a). This language has been interpreted according to its terms. Although the government may disclose Jencks Act material to a defendant in advance of trial, the government may not be required to do so. *United States v. White*, 750 F.2d 726, 728-29 (8th Cir.1984); see *United States v. Collins*, 652 F.2d 735, 738 (8th Cir.1981), cert. denied, 455 U.S. 906, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982).

This Court may not compel pretrial disclosure over government objection. *White*, 750 F.2d at 728-29; *United States v. Algie*, 667 F.2d 569, 571 (6th Cir.1982) (and cases cited therein); *United States v. Jones*, 678 F.Supp. 1302, 1303 (S.D.Ohio 1988); *United States v. Greater Syracuse Board of Realtors*, 438 F.Supp. 376, 383 (N.D.N.Y.1977). Part 12 of the order is reversed and defendants will receive Jencks Act materials as provided by law.

In part 15 of the Pretrial Order, the magistrate granted defendants' motion for disclosure of government agreements with witnesses. The government shall disclose said agreements on January 26, 1990. In all other regards, the Pretrial Order of September 30, 1989, is affirmed.

IT IS SO ORDERED.

APPENDIX A

Magistrate Symchych's Recommendations

September 30, 1989

1. Defendants' motion to find the forfeiture provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;

2. Defendants' motion to find the pretrial restraining order provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;

3. Defendants' motion to dismiss Counts VI, VII, and VIII of the indictment on the foregoing grounds be DENIED;

4. The forfeiture provisions of the indictment be dismissed with prejudice;

5. The pretrial restraining order presently in effect be vacated, and any sum expended by defendants for its monitoring be restored to them within thirty days hereof, or upon any order of the trial court sustaining this recommendation;

6. Defendants' motions to otherwise find the RICO statute, when applied to a prosecution based upon predicate offenses of obscenity, unconstitutional under the First Amendment be DENIED;

7. Defendants' motions to find the RICO statute, as applied to a prosecution based upon predicate offenses of

obscenity, to be unconstitutional in violation of the Ex Post Facto Clause be DENIED;

8. Defendants' motions to find the obscenity standard underlying the charged RICO predicate offenses and the offenses charged pursuant to 18 U.S.C. §§ 1465 and 1466, unconstitutional under the First Amendment be DENIED;

9. Defendants' motion to dismiss the indictment on grounds of equitable estoppel be DENIED;

10. Defendants' motion to dismiss the counts alleged under §§ 1465 and 1466 on grounds of temporal remoteness be DENIED;

11. Defendants' motion for leave to present an affirmative defense that he in good-faith mistakenly believed the materials in issue not to be obscene be DENIED;

12. Defendants' motion to dismiss Count I of the indictment on grounds of duplicity be DENIED;

13. Defendants' motion to dismiss Count I of the indictment on grounds of irreparable harm to the Sixth Amendment right to counsel and interference with the attorney-client privilege be DENIED;

14. Defendants' motion to dismiss Count I of the indictment on the grounds that it is properly chargeable only as a conspiracy to violate 26 U.S.C. § 7206(1) be DENIED;

15. Defendants' motion to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury be DENIED;

16. Defendants' motion to suppress evidence obtained by search and seizure be, until such time as the matter is briefed and heard, TAKEN UNDER ADVISEMENT;

17. Defendants' motion to suppress statements, including the product of electronic surveillance, be DENIED; and

18. Defendants' motion to suppress trial testimony of witness Robert Milavetz be DENIED.

APPENDIX B

Magistrate Symchych's Order

September 30, 1989

1. Defendants' briefs regarding the motion to suppress evidence obtained by search and seizure shall be submitted to United States Magistrate Patrick McNulty, and served on the United States, no later than October 20, 1989, with no further leave for extension;

2. The government's responsive brief regarding the motion to suppress evidence obtained by search and seizure shall be submitted and served no later than October 27, 1989;

3. Hearing on the motion to suppress evidence obtained by search and seizure, including all testimony and argument, is set for 10:00 a.m., November 14, 1989, before United States Magistrate Patrick McNulty in Room 530 United States Courthouse at 110 South Fourth Street in Minneapolis, Minnesota. All counsel and parties shall be present;

4. Defendant Tigue's motion for severance and separate trial from the remaining defendants is granted;

5. Trial of the remaining defendants shall proceed prior to trial [sic] of defendant Tigue, to ensure that the trial of defendant Ferris Alexander, Sr. has concluded prior to any proposed use by defendant Tigue of materials deriving from their attorney-client relationship;

6. Defendants' motion to sever the tax-related counts of the indictment from the RICO and obscenity-related counts is DENIED;

7. Defendants' motions for severance from one another for trial, with the exception of defendant Tigue, are DENIED;

8. Defendants' motion for *James* hearing regarding Count I of the indictment is DENIED;

9. Defendants' motion for disclosure of grand jury materials is DENIED;

10. Defendants' motion for disclosure of confidential informers is DENIED;

11. Defendants' motion for a list of government witnesses is DENIED;

12. Defendants' motion for pretrial disclosure of Jencks Act materials, to the extent that the government shall produce said materials 10 calendar days prior to trial, is GRANTED;

13. Defendants' motion to require government agents to retain rough notes is GRANTED;

14. Defendants' motions for discovery of Rule 16 and exculpatory materials, to the extent they cover information within the scope of FRCrP 16 and *Brady v. Maryland* and its progeny, are GRANTED;

15. Defendants' motion for disclosure of government agreements with witnesses are GRANTED;

16. Defendants' motion for notice of intent to utilize 404(b) evidence is DENIED.;

17. Defendants' motion for a bill of particulars is DENIED;

18. Defendants' motions relating to jury selection, including the number of peremptory challenges, the degree of information to be disclosed regarding prospective [sic] jurors, and the method of voir dire, are RESERVED FOR THE TRIAL COURT.

APPENDIX C

Magistrate McNulty's Recommendations

November 29, 1989

1. That the Court enter an Order denying all motions by defendants for orders suppressing evidence.

2. That the Court enter an Order directing the United States Attorney to immediately destroy all copies of the magazine title *Freier Leben* and all of the material seized in execution of Search Warrant No. 88-553 as disclosed on the receipt attached thereto.

APPENDIX D

REPORT & RECOMMENDATION AND ORDER

The indictment in this matter, set forth in 79 pages and 43 separate counts, alleges a longstanding criminal obscenity racketeering enterprise, in violation of the federal RICO statute, a 20-year criminal conspiracy to defraud the United States by impairing and impeding the Internal Revenue Service, numerous substantive federal obscenity violations, and substantive tax violations. As gleaned from the face of the indictment, the government contends that defendant Ferris Alexander, Sr., has, for those 20 years, engaged in a livelihood of purveying pornographic materials, and in the course of doing so, has both concealed his identity and hidden the proceeds of that livelihood, all for criminal purposes. It alleges that the other defendants, in a variety of roles and times, have assisted him in that criminal conduct. The codefendants include his wife, son, bookkeeper, and attorney of some 15 years.

The defendants have filed a large number of pretrial motions, including serious constitutional challenges to the use of the RICO statute in conjunction with predicate offenses of obscenity, and other First Amendment impediments to the prosecution of this matter. Additionally, defendants challenge the conspiracy count of the indictment as pleaded, raise issues about the application of the attorney-client and spousal privileges in this case, challenge the propriety of the grand jury proceedings, and seek suppression of items seized pursuant to warrant. In addition, numerous discovery-related motions have been made; motions for severance of defendants and counts

are also pending. Other motions are also pending, and are resolved below.

PROCEDURAL HISTORY

Eighty-seven search warrants were authorized between May 9 and 11, 1988, by United States Magistrate Floyd Boline.¹ The United States grand jury sat on this matter from March, 1988, until May 30, 1989, when it returned its indictment. An *ex parte* post-indictment restraining order, pursuant to 18 U.S.C. § 1963(d)(1)(A), was entered that same date, and later amended on June 29, 1989. Defendants first appeared on May 31, 1989. Orders extending the pretrial and trial schedules were entered both on June 16, 1989 and August 9, 1989, after the case was designated as complex pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A). Pursuant to these scheduling orders, the parties were to file any and

¹ Following execution of the search warrants, Ferris Alexander filed a civil complaint in this court, seeking injunctive relief against the prosecution he contemplated. He did so on many of the same First Amendment challenges he now makes in this criminal case. *Alexander v. Thornburgh*, Civil 4-88-526. United States District Judge David S. Doty granted summary judgment for the Attorney General. 713 F.Supp. 1278 (D.Minn.1989). In so doing, he rejected many of Alexander's challenges, but did not rule on the constitutionality of RICO's post-conviction forfeiture provisions under the prior restraint doctrine. In addition, the court treated the challenges as facial ones, and did not have before it, the RICO/obscenity questions as applied to Alexander in the context of an actual criminal proceeding. The appeal from the summary judgment order was dismissed as moot on August 28, 1989, by the United States Court of Appeals for the Eighth Circuit.

all pretrial motions by July 28, 1989, with hearing set for August 8, 1989. Motions were filed by all defendants in accordance with that deadline, and each appeared with counsel for hearing on August 8, 1989, except defendant Tigue, who appeared *pro se*. Defendant Ferris Alexander was then represented by Douglas Thomson, Esq. and Neal Shapiro, Esq. Defendant Dolores Alexander was represented by Jack Nordby, Esq., of the firm of Meshbesher, Singer & Spence. Defendant Wanda Magnuson was represented by David Roston, Esq., and defendant Jeffrey Alexander was represented by Joseph Friedberg, Esq. The United States was represented by Assistant United States Attorneys Paul Murphy and Mary Carlson.

At the conclusion of the hearing on that date, it was ordered that the government submit, *in camera*, the transcripts of all grand jury proceedings in the matter. That has been accomplished, and those transcripts are in possession of the court. In addition, it was then ordered that by August 9, 1989, each defendant lodge with the court his or her itemized objections to the Tigue affidavit, previously filed on July 28, 1989. That affidavit was orally ordered to then be placed under seal, for review only by the court, as it may bear on disposition of pretrial motions. Defendants submitted those objections. The affidavit remains under seal. In addition, each defendant was ordered, by August 9, to submit an itemization of which motions he or she was joining, including itemization of which search warrants were objected to by each. The latter has not been done. Last, defendants' briefs were ordered to be submitted by August 21, 1989, and the government's by August 28, 1989. The court orally outlined issues required to be briefed, so that the parties'

specific legal arguments would be before the court. Those included all First Amendment issues, all search and seizure issues, including specific alleged defects in each warrant, all grand jury issues, privilege questions, and all severance matters. Oral argument on the matters briefed was set for September 6, 1989.

On August 16, 1989, counsel for defendants Ferris Alexander, Dolores Alexander, and Jeffrey Alexander moved to withdraw. On September 12, 1989, substitutions of counsel were filed by Robert Smith, Esq. and David Forro, Esq., for Ferris Alexander, and Michael McGlen-nen, Esq. for Dolores Alexander. Counsel for Jeffrey Alexander withdrew his motion to withdraw. A short period was allowed for new counsel to review the briefs submitted on behalf of their clients by prior counsel, and oral argument was set for September 25, 1989. Counsel assumed representation after an admonishment that the pretrial proceedings had been earlier extended on two occasions, and that generous periods had been allowed for consideration, preparation and filing of pretrial motions, and for trial preparation, and that further extensions were deemed unwarranted by the court. All agreed to assume representation under those circumstances.

Counsel for each of the defendants appeared on September 25, 1989 for oral argument, as did each defendant except Jeffrey Alexander. The court required of him a sworn written waiver of appearance, which must be filed. Defendant Tigue appeared *pro se*. Counsel for the government appeared. All parties made oral argument. In addition, defense counsel sought leave to file further memoranda of law and to make new challenges to the 87

search warrants, on the basis that earlier counsel had failed to do so.

In addition, there is pending the motion of the Minnesota Civil Liberties Union for leave to appear as amicus curiae regarding the indictment of and severance issues pertaining to defendant Tigue.

The court has before it the indictment, the 87 search warrants, the grand jury transcripts *in camera*, the transcript of proceedings before Senior United States District Judge Edward Devitt regarding Robert Milavetz *in camera*, the affidavit of defendant Tigue *in camera*, the testimony of record, and the briefs of the parties. The majority of the motions are susceptible of decision on the law, and on the face of the indictment. To the extent that findings of fact are necessary to the resolution of a motion, those findings are discussed in the relevant subpart of this Report and Recommendation.

I. FIRST AMENDMENT CHALLENGES

A. RICO

Defendants seek dismissal of Counts VI, VII and VIII of the indictment, as well as the forfeiture provision of the indictment on several First Amendment grounds. They allege that, as applied to predicate conduct consisting solely of obscenity offenses, RICO is unconstitutionally overbroad because it both chills presumptively protected First Amendment activity, and operates as a prior restraint on such activity. Defendants also expressly

challenge the pretrial restraining order and postconviction forfeiture provisions of RICO as a prior restraint in derogation of the First Amendment.²

As in *Fort Wayne Books, Inc.*, many of defendants' constitutional attacks on the indictment, including its RICO counts, more accurately implicate the validity of the federal obscenity laws, than they do RICO. To the extent that is the case, this court firmly recognizes, as discussed in the next subpart of this Report and Recommendation, that obscenity does not fall within the zone of constitutionally protected speech. In fact, it is legitimately subject to the criminal enforcement powers of the government. The focused question here, then, is whether the employment of obscenity predicates in the content of a

² Defendants have not filed any motion challenging the RICO statute, as applied to predicate conduct consisting solely of obscenity offenses, on the grounds of unconstitutional vagueness. In addressing that contention, in the context of a state RICO statute, the Supreme Court, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), cast it as "nothing less than an invitation to overturn *Miller v. California*], 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] – an invitation that we reject." *Id.* 109 S.Ct. at 924. In so doing, the Court observed that the Indiana RICO statute closely tracked the federal statute, and that the holding may determine the constitutionality of use of obscenity as a predicate offense in federal RICO prosecutions. The Court reasoned that because the Indiana RICO law wholly incorporated a constitutional obscenity statute, that the vagueness challenge was without merit.

Aside from the potential vagueness challenge to the application of RICO to predicate offenses of obscenity, there has not been here, any challenge to the RICO statute itself or grounds of vagueness.

RICO prosecution unconstitutionally touches the exercise of separate and legitimate First Amendment activity. There is, in light of *Fort Wayne Books*, no longer a real question whether RICO may legitimately include the unprotected area of obscenity.

When the pretrial restraining order and post-conviction forfeiture provisions of RICO are examined with care, it becomes clear that this is a serious issue, of significant constitutional magnitude. Because such a pretrial restraining order is in place here, and because the forfeiture provisions are invoked in the indictment, it is appropriate to consider the problem both as it exists facially, on the statute, and in its application, to this case. Of course, well established principles of constitutional construction dictate that if a statute may be construed to be enforceable in a manner consistent with the Constitution, that it should not be struck down on its face. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); *Irving v. Clark*, 758 F.2d 1260, 1263 (8th Cir.1985), *aff'd*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987); and *Turchick v. United States*, 561 F.2d 719, 723 (8th Cir.1977). The court is mindful that in reviewing a statute's facial validity, pre-existing constitutional requirements should be impliedly read into the words of the statute, when it is reasonably possible to do so. *Cf. New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Time Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Even with these precepts in the forefront, it is the conclusion of this court that the RICO pretrial restraining order and post-conviction forfeiture provisions, when employed with predicate offenses of obscenity, are both facially unconstitutional,

as well as unconstitutional in their application in this case. They are overbroad, and also constitute prior restraints of legitimate First Amendment activity.

This analysis must begin with a reaffirmation of the unflagging protection afforded by our Constitution to the robust exchange of ideas in our polity, and its avowed contribution to our national strength and diversity. *New York Times v. Sullivan*, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). The underpinnings of these First Amendment values are so potent as to result in a legal presumption that the exchange of ideas is constitutionally protected. This presumptive zone of First Amendment activity is well-established in our jurisprudence, and recently confirmed. *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957); *Thornhill v. Alabama*, 310 U.S. 88, 101-02, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940); *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J. joined by Holmes, J. concurring); *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J. dissenting); and *Fort Wayne Books, Inc.*, 109 S.Ct. at 929.

1. Overbreadth

Although a statute may legitimately exist to regulate and punish unprotected expressive activity, e.g. *New York Times*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; (libel), *Gertz v. Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); and *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir.1974); ("fighting words"), *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92, 72 S.Ct. 512, 520, 96 L.Ed. 586 (1952) (advocating violent overthrow of the government); *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir.1976); (obscenity), *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); and *United States v. Freeman*, 808 F.2d 1290 (8th Cir.), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 697 (1987), it may not, at the same time, reach out to touch or encompass these presumptively protected First Amendment activities. If it does, it is unconstitutionally overbroad. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); and *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1391-92 (8th Cir.1985).

Defendants argue that the restraining order provisions and post-conviction forfeiture provisions of RICO do just that, when employed in an obscenity context. The Supreme Court did not address the constitutionality of the RICO forfeiture provisions in this context in *Fort Wayne Books, Inc.* because none of the cases then before it involved such a forfeiture. *Id.* 109 S.Ct. at 928 n. 11. Although it struck down, as a prior restraint, a pretrial seizure of three bookstores and their contents, the Court did not address the use of a restraining order, such as the one entered in this matter. In *Alexander v. Thornburgh*, the court did not reach the constitutionality of the forfeiture provisions under the prior restraint doctrine. 713 F.Supp. at 1294. It did uphold the facial validity of those provisions, however, against an overbreadth challenge. *Id.* at 1289.

The forfeiture provisions in issue here are set forth at 18 U.S.C. § 1963(a), (b), (c). Upon conviction, the sentencing court is mandated to order the statutory forfeiture, which is not limited to those assets tainted by the racketeering activity. Instead, the forfeiture applies to the defendant's entire interest in

- any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962; and (18 U.S.C. § 1963(a)(2))
- any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of Section 1962. (18 U.S.C. § 1963(a)(3)).

The parties here, and the courts reviewing these forfeiture provisions, have commonly understood them to include business and property of the convicted person, even if a portion of that business or property entails or is attributable to legitimate business operations. Eg. *United States v. Busher*, 817 F.2d 1409 (9th Cir.1987); and *Alexander v. Thornburgh*, 713 F.Supp. at 1289. The legislative history squares with this view, and evinces a congressional intent to attack racketeering at its economic roots through the mandatory forfeiture clause. A line of cases, including *Alexander*, and *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va.1987), concludes that a penalty provision, such as a fine or forfeiture, is not constitutionally constricted by the amount received by a defendant in connection with the specific activity for which he was convicted. A fine, for instance, may extend in the court's discretion, to an amount commensurate both to his ability to pay and to

serve some deterrent value. In upholding the forfeiture provision on this rationale, the court in *Thornburgh* noted that "if plaintiff's argument were accepted, it would seemingly invalidate any penalty provision . . . in an amount that is not tied to the profits earned from the sale of obscene materials. . . ." 713 F.Supp. at 1289. *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir.1987), and *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293 (6th Cir.1986), cert. denied, 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698 (1987), follow the same rationale in upholding fines imposed against book-sellers for obscenity violations.

The imposition of a fine is a fundamentally distinct punishment from the forfeiture of an entire business or enterprise, as is contemplated by § 1963. When the businesses, enterprises, or properties contemplated within § 1963 are engaged in a mixture of lawful distribution of expressive materials and obscenity, the statute quite clearly contemplates wholesale forfeiture, including the lawful portion. the all-encompassing statutory language seems emphatic in this regard. If the asset is "derived from . . . directly or indirectly", the proceeds of racketeering, it is forfeitable under § 1963(a)(3). *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D.Ga.1980) (forfeiture applies to any chattel including books or movies which are seized not because of their contents but because they were realized through or derived from crime). On its face, the statute could encompass the forfeiture of major national bookstore chains in the event that a jury in one judicial district found it to be engaged in the multiple sales of, for example, a given obscene magazine in a single locale, in violation of the racketeering laws. Likewise, under § 1963(a)(2), if a convicted

racketeer "participated in" any enterprise in violation of § 1962, the entire interest held by him in that enterprise is forfeitable, even if it, in some proportion, involves mainstream, lawful dissemination of expressive materials. In *Fort Wayne Books, Inc.*, 109 S.Ct. at 928, the Court, in *dicta*, stated that for purposes of deciding that case, but without deciding the issue, it assumed that bookstores and their contents are forfeitable when it is proved they are "used in or derived from" obscenity racketeering activity. The Supreme Court clearly did not decide the issue, and articulated an assumption far more narrow than the forfeiture provisions of § 1963. Because the forfeiture provisions of § 1963 contemplate, wholesale forfeiture without regard to consequences to the exercise of protected expressive acts, it must be concluded that in the context of RICO/obscenity prosecution, the forfeiture provisions of § 1963 are impermissibly overbroad on their face, and may not be employed. Likewise, as measured against a reading of the indictment in this case, which sets forth a claim for forfeiture including multiple bookstores, theatres, and videotape rental establishments, the forfeiture provisions, as applied, are unconstitutionally overbroad.

The overbreadth of the forfeiture provisions, however, should not result in a dismissal of the RICO counts of the indictment. Because they amount to only one of several available criminal penalties should there be a conviction, the prosecution under the RICO counts can properly go forward without the availability of the forfeiture remedy. *United States v. Marubeni America Corp.*, 611 F.2d 763, 769-70 (9th Cir.1980) (court dismissed forfeiture derived from single count which alleged violation of 18

U.S.C. § 1962(c) and noted that such was not only effective penalty against corporate racketeers).

It is, therefore, recommended that defendants' motion to find the forfeiture provisions of 18 U.S.C. § 1963, when employed in a case involving predicate offenses of obscenity, to be unconstitutionally overbroad both on their face and as applied, be granted. It is, however, recommended that the motion to dismiss Counts VI, VII and VIII of the indictment on this basis be denied.

The provision permitting the entry of a pretrial restraining order, 18 U.S.C. § 1963(d)(1), suffers from overbreadth for the same reasons set forth above. The only purpose of the restraining order provision is to enable the post-conviction forfeiture. The statute makes clear that such an order is issuable "to preserve the availability of property . . . for forfeiture under this section." The Supreme Court in strong language struck down the pretrial seizure of the three bookstores in *Fort Wayne Books, Inc.*, finding it to constitute a prior restraint. It is clear that any system of prior restraint carries a strong presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). The "risk of prior restraint" existing with the statutory vehicle for such pretrial seizures, was sufficient to strike down the order in *Fort Wayne Books, Inc.*, 109 S.Ct. at 927-28.

The facts there, however, involved the wholesale seizure of three bookstores and their contents resulting in the interruption of sales of presumptively protected books and films. *Id.* at 929. The precedent cited by the

Court involved holdings which turned on the actual removal of expressive materials from circulation. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986); and *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

The restraining order here is wholly unlike the pre-trial seizure order in *Fort Wayne Books, Inc.* It expressly authorizes the continuation of all business activity by each of the entities identified in the forfeiture pleadings. It has been amended to allow the sale of one of those entities as authorized by a local court. It essentially limits defendants only in terms of the transfer of title to any of the entities. It was issued *ex parte*, and under seal, along with the filing of the indictment, on May 30, 1989. It was issued much in the manner of a search warrant, upon an affidavit showing of probable cause by the case agent. Encompassing 32 pages, the order applies to each of the defendants, to some 48 "controlled entities," and the accounts of the defendants and entities at 14 specified financial institutions. It also orders counsel for defendants and "other persons acting for or in concert with" the defendants or entities to comply with its terms. The overall prohibition of the restraining order is against alienation, transfer, sale or dissipation of the capital assets. It imposes recordkeeping requirements, specifying documentation necessary for transactions included within the ordinary course of business. The order defines the ordinary course of business to include, among other things, payment for inventory and supplies, ordinary use of equipment and supplies, and other things. The order

also provides for government monitoring of the operations of the "controlled entities", to guard against dissipation and waste. The monitoring requires the review of books and records, and is to be compensated for by defendants. The order provides defendants with the alternative of a performance bond, in an amount to be set, if they elect that option. The order is entered at docket #6.

This quite clearly constitutes a substantial governmental intrusion into ongoing businesses which are apparently engaged in distribution of expressive materials. Without any prior adversarial hearing, or any adjudication that this activity is wholly within the unprotected zone of obscenity, this restraining order suffers from the same overbreadth problem as does the forfeiture clause. *Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), and *Heller*, 413 U.S. at 492, 93 S.Ct. at 2794. In fact, from the time of the indictment until the time of trial, this restraining order has and will have more direct effect on that part of the businesses engaged in presumptively protected distribution than will the forfeiture pleadings.

For these reasons, the availability of a pretrial restraining order under § 1963(d) is facially unconstitutional overbroad in a RICO prosecution predicated upon underlying obscenity offenses. In this case, the existing restraining order is likewise impermissibly overbroad. It is therefore recommended that the motion to find them so be granted, and that the restraining order be vacated, with a return to defendants of all sums thus far expended in honoring the terms of that order. *Cf. Thornburgh*, 713 F.Supp. at 1293, where the court suggests that a

performance bond requirement could serve as a constitutional means of preserving forfeitable assets in the case of a bookseller charged in a RICO/obscenity case.

2. Prior Restraint

These same two provisions are alleged to violate the First Amendment as an unconstitutional prior restraint. The prior restraint doctrine has, as its chief function, the guaranty of prevention of previous restraints on publication or dissemination of expressive matters. *Near v. Minnesota*, 283 U.S. 697, 713, 51 S.Ct. 625, 630, 75 L.Ed. 1357 (1931). In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976), the Court stated that prior restraints are the most serious and intolerable of infringements on First Amendment rights. They come to the Court with a heavy presumption weighing against them. *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70, 83 S.Ct. at 639. In *Near's* early pronouncement of the doctrine, the Supreme Court drew a clear line between unlawful prior censorship, and post-publication punishment imposed following legal process. The former is in violation of the First Amendment, and the latter is not. 283 U.S. at 714, 51 S.Ct. at 630.

The government here argues that the forfeiture provision falls into the latter category, and is employed only after the substantial judicial safeguards inherent in a criminal prosecution have been satisfied. It argues, based on *Fort Wayne Books, Inc.*, that some degree of resultant self-censorship, is not enough to invalidate a penalty provision imposed by past obscenity related conduct. In passing on the propriety of using obscenity offenses as

predicate acts under RICO, the Court acknowledged that the stiff RICO penalties might act as a deterrent "and cause some cautious booksellers to practice self-censorship and remove First Amendment protected materials from their shelves." *Fort Wayne Books, Inc.*, 109 S.Ct. at 925. The Court observes it to be a practical reality that criminal obscenity statutes will inhibit the dissemination of some materials which are not obscene. The RICO forfeiture provision, however, involves more than the mere threat of self-censorship because it authorizes the seizure and removal from the stream of commerce businesses actually involved in protected expressive acts that have not been a subject of a prior criminal conviction. The Court expressly stated in a footnote, that it was not, in *Fort Wayne Books, Inc.*, passing upon the issue of RICO forfeiture provisions as a prior restraint. *Id.* at 928 n. 11. In leading to this footnote, the Court quoted the Indiana Court as stating that the Indiana RICO forfeiture provision "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *Id.* at 928.

If that were truly the substance and the effect (*Near*, 283 U.S. at 708-09, 51 S.Ct. at 628) of § 1963(a)(2) and (3), it would be simple to conclude that RICO's forfeiture provisions do not constitute a prior restraint. However, as discussed above, the forfeiture statutes are broadly drawn and designed to result in forfeiture of the entire property interests of the convicted racketeer, even if that interest may in large part be derived from lawful sources. In the case of bookstores, theaters, and movie distribution enterprises, it may well be the case that the forfeiture involves substantial inventories of actual protected

expressive materials, as well as those presumptively protected until adjudicated otherwise. The forfeiture statute is drawn without any proportionality of this mix in mind, and was in fact enacted prior to the addition in 1984, by Congress, of obscenity as an additional predicate offense. There is no statutory provision confining the forfeiture penalty solely to the disgorgement of assets acquired through racketeering activity, as the Indiana Court discussed. To the extent that businesses engaged primarily in the legitimate distribution of expressive nonobscene materials are forfeitable, as a penalty for obscenity racketeering, it is difficult to see how such a forfeiture does not constitute a prior restraint, *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir.1984), *rev'd on other grounds, sub nom Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

A penalty provision implicating the ongoing business of presumptively protected activities must be more narrowly drawn in order to avoid that consequence. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 n. 19, 104 S.Ct. 2118, 2126 n. 19, 80 L.Ed.2d 772 (1984) ("[w]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack"). *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980); *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659 (1976); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 439, 83 S.Ct. 328, 338, 340, 9 L.Ed.2d 405 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940).

In numerous instances, federal courts have struck down overly broad penalties for obscenity convictions as an impermissible prior restraint. Eg. *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir.1983); *Entertainment Concepts Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980); *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir.1978), *aff'd on other grounds*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); and *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980). The language of the *Cornflower* court is typical of the holdings of these cases, that the penalties were not in fact imposed for past abuses, and instead amounted to prior restraints: "To reason that an involuntary closure of a motion picture theater for past obscenity violations does not constitute a prior restraint is clearly contrary to the Supreme Court's definition of prior restraint." 485 F.Supp. at 786. Likewise, the forfeiture contemplated here, of entire businesses engaged in the distribution of books, magazines, and movies, is an overly broad penalty even for obscenity racketeering, and therefore constitutes a prior restraint of those entities.

It is, therefore, recommended that RICO's forfeiture provisions, when employed in a prosecution having predicate obscenity offenses be held facially unconstitutional as prior restraints. It is recommended, however, that the motion to dismiss the RICO counts on that basis be denied.

Likewise, the pretrial restraining order provision of RICO, in the context of a RICO/obscenity prosecution, is unconstitutional on its face as a prior restraint. *Fort Wayne Books, Inc.* has expressly so held in the instance of a pretrial seizure of three bookstores in a RICO/obscenity prosecution. 109 S.Ct. at 927. In observing that thousands of books and films were taken out of circulation by the pretrial seizure, the Court stated that without an adversarial hearing in which the presumption of First Amendment protection was overcome, the prior-restraint doctrine was violated.

The issuance of a restraining order, even if it allows the business to carry on in its usual course, is not sufficiently constitutionally distinct to escape this holding. Such a restraining order, as is evident from the one in place here, puts entire businesses into the class of "controlled entities," enjoins dissipation of their assets, imposes recordkeeping requirements, and most significantly, requires the oversight of the businesses by the same entities involved in the pending prosecution of the matter. It is self evident that these restrictions constitute such a significant degree of government involvement in the operations of protected First Amendment activities as to be the equivalent of unconstitutional censorship. "The way in which a restraint on speech is 'characterized' . . . is of little consequence" for purposes of prior restraint analysis. *Near*, 283 U.S. at 720-21, 51 S.Ct. at 632-633, cited in *Fort Wayne Books Inc.*, 109 S.Ct. at 929.

The ongoing court-ordered intrusion of the government is sure to chill the involvement of suppliers, customers, employees and other third persons doing a day-to-day business with these "controlled entities", whose

every transaction is subject to the eye of an agent also involved in the racketeering prosecution of those entities.

For these reasons, the restraining order provisions of the RICO statute, when applied in a case involving obscenity predicates, and as embodied in docket #6 herein, amount to unconstitutional prior restraints. They should be vacated here, but the RICO counts should nonetheless survive, for the reasons discussed above.

3. *Ex-Post Facto Prohibition*

The Ex Post Facto doctrine prohibits the criminalization of an act performed prior to the passage of the relevant criminal proscription. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). Defendants argue that because the RICO counts of the indictment allege a racketeering enterprise from 1969 on, and because obscenity was added only in 1984 as a permissible predicate offense, that this prosecution impermissibly criminalizes conduct occurring before 1984. They argue that because the First Amendment presumptively protected all expressive activity for RICO purposes prior to 1984, that the charge of an obscenity racketeering enterprise prior to that date cannot be sustained.

The argument is not persuasive. As the government urges, Congress gave fair warning on the face of the RICO statute that those who had committed a predicate act prior to its enactment, could be properly prosecutable under its provisions upon the commission of an additional single predicate act. This argument has been repeatedly sustained against attacks under the Ex Post

Facto prohibition. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); *United States v. Campanale*, 518 F.2d 352 (9th Cir.1975), *cert. denied*, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976); and *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va.1987).

Because constitutional federal state and obscenity statute existed prior to the 1984 legislation which added obscenity as a predicate act, the foregoing precedent sustains the government claim that a portion of the predicate conduct or proof of racketeering may nonetheless predate the 1984 legislation.

The motion to dismiss the RICO counts as violative of the Ex Post Facto clause should be denied.

B. OBSCENITY COUNTS

1. Constitutionality of Obscenity Standard

Counts 6 through 42 of the indictment charge defendants Ferris J. Alexander, Sr., Dolores Alexander, Jeffrey Alexander and Wanda Magnuson with substantive violations of the federal obscenity laws. 18 U.S.C. §§ 1465 and 1466. Defendants seek dismissal of those counts, inviting the trial court to reexamine the constitutional validity of the Supreme Court's obscenity standard in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). They complain that the standard is overbroad, exceeding the legitimate governmental interest of protecting minors, unwilling adults, and neighborhoods; is so constitutionally vague that it inhibits free speech and violates due process; is lacking in a meaningful scienter element; and

in combination with the enhanced RICO penalties, improperly chills free speech.

The *Miller* standard has been repeatedly addressed, and upheld, by the Supreme Court. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977); and *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). The Court just this year refused any invitation to reexamine the *Miller* standard in *Fort Wayne Books, Inc.* Accordingly, all lower courts, including this one, are bound by it. The law of the land quite plainly is that obscene expression, as defined by the three-part *Miller* test, falls outside First Amendment protection, and is punishable under the criminal law.

No more need be said.

2. Viability of § 1466

This statutory provision, enacted in November, 1988, makes it a federal offense to engage in the business of selling or transferring obscene matter. Paragraph (b) of the statute contains a rebuttal presumption that

the offering of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles

amounts to engaging in the business, as proscribed under paragraph (a). The penalty for this offense is enhanced from the penalty for conviction under § 1465.

Counts 32 through 42 charge defendants, with the exception of defendant Tigues, under § 1466. They challenge the constitutionality of the statute both on vagueness grounds, and on the grounds that the presumption violates due process of law within the meaning of *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) as well as the burden of proof requirement, as proscribed by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

The alleged vagueness of the obscenity standard is disposed of in the preceding section, and the alleged vagueness of the terms "engaged in the business" and "receiving" does not rise to the level required for a statute to be constitutionally infirm on that basis. The plain language of the statute, coupled with the scienter element of the offense is sufficient to put a reasonable person on notice of what the statute proscribes.

The presumption, which is rebuttable, as set forth, clearly meets the due process test that "the presumed fact must be more likely than not to flow from the proven fact on which it is made to depend." *Leary*, 395 U.S. at 36, 89 S.Ct. at 1548. The presumption, in fact is derived from and almost identical to that in § 1465, and upheld after challenge in *United States v. Manarite*, 448 F.2d 583 (2d Cir.) cert. denied, 404 U.S. 947, 92 S.Ct. 281, 285, 287, 298, 30 L.Ed.2d 264 (1971).

Accordingly, defendants' motions for dismissal of the counts based on 18 U.S.C. § 1466 should be denied.

3. Equitable Estoppel

Defendants argue that this prosecution is a "sudden, unexpected, and unwarranted reactivation of prosecution" of obscenity matters by the federal authorities, which must be foreclosed on the grounds of equitable estoppel. They claim that because defendant Ferris Alexander has not been prosecuted by the federal authorities for 17 years, that he has come to rely in his business dealings on some sort of governmental acquiescence in the non-obscene nature of his business dealings. He argues, in part, that he has construed this non-prosecution as a conformity of his books and movies with the "contemporary community standards" of the *Miller* test. They contend, secondly, and as part of this theory, that they were constitutionally entitled to some fair warning on the part of the government, that it regarded these materials as obscene, before prosecution could properly go forward. Thirdly, as part of this theory, they argue that these defendants have been improperly segregated out for prosecution on federal obscenity grounds, and that this selectivity in their prosecution is fatal.

Each of these arguments is rejected, and the court concludes that whether characterized as "equitable estoppel" or an aspect of "due process", the government cannot properly be foreclosed from proceeding for these reasons.

Defendants' reliance on the equitable estoppel theory derives from *Watkins v. United States Army*, 875 F.2d 699 (9th Cir.1989) (*en banc*). The case involved a claim for injunctive relief against the Army regarding qualifications for enlistment. No case has been cited to the court

involving an equitable estoppel in a criminal prosecution. In fact, authority exists for the proposition that it is inapplicable in a criminal matter. *United States v. Anderson*, 637 F.Supp. 1106 (D.Conn.1986). There has been no showing of any affirmative representation by any government official having authority to do so, indicating that defendant's conduct was non-prosecutable, or that the government would not prosecute it. Cf. *United States v. Bruscantini*, 761 F.2d 640 (11th Cir.), cert. denied, 474 U.S. 904, 106 S.Ct. 271, 88 L.Ed.2d 233 (1985).

The government's recitation of the published opinions regarding obscenity in the federal reporters during recent years is probative that federal prosecutions have indeed occurred. Moreover, the enactment of RICO, and the 1984 amendment adding obscenity as a predicate offense, were clear indicators, long before 1989, that Congress regarded trafficking in obscenity as a serious criminal offense. There is no requirement, other than the clarity of the language in the statute involved, that a defendant be forewarned of the possibility of prosecution before a charge may be brought. As the Court stated in *Fort Wayne Books, Inc.*, the Supreme Court has never required the prosecution to "fire warning shots." 109 S.Ct. at 926.

Defendants have not met their threshold heavy burden in pursuing the claim of selective prosecution. *United States v. Catlett*, 584 F.2d 864 (8th Cir.1978). Without doing so, they are not entitled to further hearing to inquire into the motives behind the prosecution. Based upon the indictment's contents and the other information before the court in this matter, it appears that the prosecution is well within the bounds of fair prosecutorial discretion.

Cf. *United States v. Hazel*, 696 F.2d 473 (6th Cir.1983); *United States v. Rice*, 659 F.2d 524 (5th Cir.1981); and *Catlett*, 584 F.2d 864.

Consequently, the motion to dismiss on grounds of equitable estoppel should be denied.

4. Temporal Remoteness

Defendants also challenge the obscenity related counts, seeking their dismissal, on the argument that the dates of the charged offenses are too remote to be fairly judged by jurors according to the constitutional *Miller* test of "contemporary community standards." They claim also that young jurors are generally more favorable to them, and that those who were young at the time of the alleged offenses are not now so young, and as a corollary, that jurors who are now 18 are not competent to sit in judgment of contemporary community standards as they existed in 1984-1988. They also assert that they are deprived of obtaining viable surveys regarding community reaction to specific books or movies, because community standards may now differ from what they were at the time of the offenses.

These clearly are not the type of reasons warranting the remedy of dismissal. A defendant in a criminal case is entitled to a fair jury, selected from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). He is not entitled, as such, to have any given class, race, or gender seated on his jury. The serious question of selective, discriminatory removal of certain groups of jurors, is not presented in this case.

Cf. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The acknowledged fluidity of contemporary community standards in the case law – see *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976), does not require the prosecution of an obscenity case to occur in the same year as the offense date.

There is no merit to defendant's analogy of the preindictment delay cases where dismissal may flow from inordinate preindictment delay, utilized by the prosecution for its tactical advantage, and to the prejudice of the defendant. *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). Moreover, the requisite elements required for dismissal on those grounds have not been demonstrated here.

The charges should not be dismissed for temporal remoteness.

5. Affirmative Defense

Defendant Ferris Alexander seeks a pretrial order granting him the right to prevent an affirmative defense that he was in good-faith mistaken whether the materials upon which the obscenity-related charges are based fell within the *Miller* three-part test. The predicate for the motion is the composite of defendants' arguments challenging the *Miller* test. Especially, as respects this motion, defendant carries on his claim that *Miller* and its progeny fail to include a constitutionally adequate scienter, or *mens rea*, requirement. As articulated by the Supreme Court in *Hamling v. United States*, 418 U.S. 87, at 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974), the government

must prove that a defendant charged with obscenity "knew the contents, nature, and character of the materials." The Court has expressly held that the government need not prove defendant knew the materials to be obscene.

To permit defendant to go forward with his affirmative defense, as proposed, would have the effect of nullifying the Supreme Court's *mens rea* standard in obscenity matters.

Accordingly, the Motion should be denied.

II. THE CONSPIRACY COUNT

Count I of the indictment is the only count in which each of the defendants is charged along with all the others. It is the only count in which defendant Tigue is charged. It alleges that from 1969 until the return of the indictment, the defendants conspired to defraud the United States, in violation of 18 U.S.C. § 371, "by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service" by concealing the amounts and deposits of income, the true ownership, control, management and operation of, and sources of funds used to acquire and expand Alexander's businesses. The charge is a so-called *Klein* conspiracy, in which the alleged objective is to defraud the United States by obstructing the IRS in its duties of identifying and collecting taxable income. *United States v. Klein*, 247 F.2d 908 (2nd Cir.1957).

Defendants seek the dismissal of this count on a variety of grounds, as well as severance from one another

on this count. The arguments include a claim that the count is improperly duplicitous because it in fact charges multiple conspiracies, that it is brought in derogation of the Sixth Amendment right to counsel and attorney-client privileges, that a more specific available statute exists causing the broad-scale conspiracy to be improperly charged, and that a *James* hearing is necessary before the count may proceed to trial. Each of these arguments is without merit insofar as dismissal is sought. With respect to severance, however, the claims regarding attorney-client privilege are meritorious, and will result in the severance of defendant Tigie for trial.

1. Duplicity

Defendants argue that Count I fails to charge a single conspiracy and that, on its face, it demonstrates the charging of at least two, and as many as eight, separate conspiracies. If that is indeed the case, the indictment is duplicitous on its face, and carries the potential harm that a defendant will be unable to determine on a verdict form if he has been found guilty of all those conspiracies, or some combination of a few, or only one. The pleading of former jeopardy to a later like charge then becomes problematic. It is true that these are the evils to be protected against when an indictment is duplicitous. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1954) and *United States v. Snider*, 720 F.2d 985 (8th Cir.1983), *cert. denied*, 465 U.S. 1107, 104 S.Ct. 1613, 80 L.Ed.2d 142 (1984).

Defendants have proffered facts and schematic charts to explicate their argument that multiple conspiracies are

charged. The government, at pages 5-11 of its brief on the subject, makes a proffer of how the charged conspiracy is a single conspiracy. These opposing theories as to the conspiracy count are entirely dependent upon proof at trial of their underlying assertions, and, in short, amount to "trial of the general issue" within the meaning of Fed.R.Crim.P. 12(b). For that reason, they are not, at the pretrial motions stage of the proceeding, an appropriate means of resolving the duplicity question. For this timing reason alone, in order to leave resolution of the factual contentions to a determination by a jury, the motion should be denied at this stage. *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), *cert. denied*, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986); and *United States v. Williams*, 644 F.2d 950, 952 (2nd Cir.1981).

An examination of Count I, as pleaded, however, fails to reveal a facial defect in terms of duplicity. A single objective is pleaded at the outset, namely a joint effort to defraud the United States by means of conducting Ferris Alexander's businesses in such a manner as to impede and impair the IRS. It does not defeat the pleading of this single conspiratorial objective that multiple discrete groups of participants or projects exist. *United States v. Peyro*, 786 F.2d 826, at 829 (8th Cir.1986); *Snider*, 720 F.2d at 988. The lesser participation of one defendant, or his participation of one defendant, or his participation in only one facet of a multi-faceted conspiracy, does not warrant the conclusion that an indictment is defective for the improper allegation of multiple conspiracies in a single count. *United States v. Lee*, 782 F.2d 133, 135 (8th Cir.1986); *United States v. Massa*, 740 F.2d 629, 636 (8th

Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); and *United States v. Warner*, 690 F.2d 545, 549 (6th Cir.1982).

Complex conspiracies, involving multiple parties designated to fulfill multiple subsidiary functions may be properly charged in a single count, even if the allegation involves activities over a protracted period. The linchpin for such a charge to be properly pleaded is the existence of a single common objective. *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir.1987). *See also*, *United States v. Napue*, 834 F.2d 1311 (7th Cir.1987), and *United States v. Standard Drywall Corp.*, 617 F.Supp. 1283, at 1299 (E.D.N.Y.1985).

As is clear from much of the precedent on this question of duplicitously pleaded conspiracies, the question most often is incapable of full resolution until after the jury verdict when the jury has been instructed regarding the singular objective requirement and has decided whether or not it has been sustained. *Eg. United States v. Bledsoe*, 674 F.2d 647 (8th Cir.1982), and *United States v. Coward*, 630 F.2d 229 (4th Cir.1980).

Because the motion to dismiss on grounds of duplicity should be denied, defendants' argument that the separate multiple conspiracies are barred under the statute of limitations also falls. With a properly pleaded single conspiracy in Count I, the limitations period is measured from the date of the last overt act set forth in the count. *Fiswick v. United States*, 329 U.S. 211, 216, 67 S.Ct. 224, 227, 91 L.Ed. 196 (1946); *Buford v. Tremayne*, 747 F.2d 445, 448 (8th Cir.1984); *White v. Bloom*, 621 F.2d 276 (8th Cir.1980), *cert. denied*, 449 U.S. 1089, 101 S.Ct. 882, 66 L.Ed.2d 816

(1981). Because that last overt act is alleged to have occurred on November 3, 1988, and because the indictment was returned within five years of that date, there is no violation of the applicable statute of limitations in Count I. 18 U.S.C. § 3282.

2. Sixth Amendment Right to Counsel and Attorney-Client Privilege

Defendants' motion to dismiss on these grounds is put to the court in strong terms, including allegations of deliberate prosecutorial misconduct. Fact findings are necessary to examination and disposition of the issue. Based upon the testimony of defendant Tigue, the continuing assertion of attorney-client privilege by defendant Ferris Alexander, the sealed Tigue affidavit, and the grand jury transcripts, the following facts are determined:

Defendant Tigue is a licensed attorney, admitted to practice in a number of courts, including this federal court and the state courts of Minnesota. He has handled a significant amount of First Amendment and obscenity litigation, and is likely to be regarded by members of the bar as a specialist in those areas. Defendant Tigue has continually represented defendant Ferris Alexander from 1974 until the date of this indictment, with only a short hiatus of nonrepresentation around 1981. He has represented defendant Ferris Alexander in those 15 years on some 50 different matters, including litigation, business negotiations, and real estate transactions. It appears that during such representation he has served as an attorney, rather than as a business

advisor, scrivener, partner, or in some other capacity. During those representations, privileged communications presumptively and, in fact, occurred. Defendant Tigue has from time to time, represented each of the other codefendants. During the course of those representations, privileged communications presumptively occurred.

Defendant Tigue has represented defendant Ferris Alexander during the investigative stage of this prosecution, beginning that representation in May 1988, upon execution of the search warrants issued by United States magistrate Floyd Boline. That representation continued until the return of the indictment, in which they were both named as defendants.

During the course of the representation regarding the defense of this case, privileged communications presumptively and, in fact, occurred. Those communications involved legal advice regarding past conduct which was the subject of the contemplated charges. During the months between May 1988 and May, 1989, legal and factual strategies for the defense of the contemplated charges were discussed and formulated.

At no time before the return of the indictment did defendant Tigue or defendant Ferris Alexander become aware that the former may be charged in this matter.

As of June 17, 1988, when defendant Tigue filed a civil complaint seeking injunctive relief as to this investigation, the individual prosecutors in this case became aware of defendant Tigue's representation of defendant Ferris Alexander relating to this criminal investigation. *Alexander v. Thornburgh*, 713 F.Supp. 1278. By his continual

involvement in that matter, including argument on summary judgment motions in November, 1988, and prosecution of an appeal to the Eighth Circuit, they were individually aware of the continuation of that representation well into May, 1989.

A grand jury subpoena was issued to defendant Tigue sometime before November 21, 1988, on which date he appeared and testified before the grand jury. No questions were asked of him as to his potential criminal liability in this matter, and nothing led him to believe he was a subject of the investigation.

Defendant Tigue intends, in his defense of this matter, to invoke his right under Rule 1.6(b)(4) of the Minnesota Rules of Professional Conduct, to disclose privileged communications of defendants.

Defendant Ferris Alexander intends to and has invoked the protection of the attorney-client privilege.

Defendant Ferris Alexander intended to hire defendant Tigue for, and defendant Tigue had in fact performed work as lead counsel on the obscenity aspects of any forthcoming indictment.

Defendants seek dismissal as a result of these circumstances, with defendant Ferris Alexander arguing that the government has deliberately interfered with his Sixth Amendment right to counsel and that it has engaged in deliberate prosecutorial misconduct during this sequence of events. He argues also for the dismissal of charges against his codefendant Tigue, as the only available means of preserving the privileged material between him

and his former attorney. He urges that it is through the government's actions, and through the fault of no one else, that an attorney-client relationship was allowed to develop on the defense of this very matter up to and including the date of indictment.

In response, the government argues that rules of grand jury secrecy preclude the disclosure of who may or may not be indicted in a given case, and that no prospective defendant is entitled to a so-called target warning. It claims that its conduct is not to be faulted, and that the communications between defendants Tigie and Ferris Alexander are not privileged due to the crime-fraud exception to the attorney-client privilege. They urge that an examination of the charge in the indictment and the grand jury materials allows such a ruling prior to trial. Even without such a pretrial ruling, the government argues that the communications would constitute inadmissible hearsay, and that as a consequence, these two defendants should remain joined as coconspirators, and that dismissal should be denied.

Absent some showing of actual prejudice, an indictment is not dismissible on the grounds asserted here. *United States v. Morrison*, 449 U.S. 361, 367, 101 S.Ct. 665, 669, 66 L.Ed.2d 564 (1981). The case is quite squarely on point, involving a deliberate intrusion through a codefendant/informant into the attorney-client relationship of a charged defendant. The Court of Appeals had found a Sixth Amendment violation and held that the indictment should be dismissed with prejudice. The Supreme Court reversed on the remedy, holding that in the absence of a showing that representation at trial was impaired, dismissal was not proper. It cited numerous cases in which

counsel had been interfered with, but no dismissal awarded. Eg. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and *O'Brien v. United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967). It observed that the remedy for these, and other constitutional infractions under the Fourth and Fifth Amendments, has been suppression of tainted evidence.

In this case, no tainted evidence has been procured by the government, and if it somehow is forthcoming, it can be suppressed by the trial court. Because the constitutional right to the assistance of counsel does not include an absolute right to one's choice of counsel, and because defendant Ferris Alexander is now represented by seemingly experienced, competent counsel in the subject area, there is no showing of the type of prejudice which should call for dismissal.

This leaves the question about the potential disclosure by defendant Tigie of communications as to which defendant Ferris Alexander has asserted a claim of attorney-client privilege. As noted above, defendant Tigie has stated his intent to invoke the rules of ethics which allow his use of privileged materials in order to defend himself. He cannot be deprived of matter deemed material to his defense without intrusion into his constitutional right of self defense. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). The government's contention that such communications would constitute inadmissible hearsay are not well-founded, especially in light of the record here. It establishes that defendant Tigie's use of these privileged communications would go to the question of his intent, or purpose, in committing

the acts charged against him in Count I. He has more than once offered to stipulate to the majority of those allegations, and to go to trial on the intent issue. That being the main dispute then, between the government and defendant Tigue, it appears that defendant Alexander's communications are likely to fall into the state-of-mind exception to the hearsay rule. Rule 803(3) of the Federal Rules of Evidence. Under like circumstances, such statements have been admitted over a hearsay objection. *United States v. Partyka*, 561 F.2d 118 (8th Cir.1977), cert. denied, 434 U.S. 1037, 98 S.Ct. 773, 54 L.Ed.2d 785 (1978); *United States v. Taglione*, 546 F.2d 194 (5th Cir.1977).

This leaves then the application of the crime-fraud exception, and the remaining question of severance. If it is the case that the crime-fraud exception swallows the entirety of the communications in issue here, it would seem that a joint conspiracy trial is in order, as the government urges. The Supreme Court has just recently treated relevant facets of the crime-fraud exception. *United States v. Zolin*, ___ U.S. ___, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). There, the Court reiterated the well-accepted delineating of past versus future wrongdoing, and the application of the privilege. "The . . . privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection - ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." 109 S.Ct. at 2626, citing 8 Wigmore, § 2298, p. 573 (emphasis original). Defendants persuasively argue, and the fact record amply supports, the position that defendant Tigue's representation of Ferris Alexander during the investigation phase of

this criminal matter is unarguably outside the crime-fraud exception, because the investigation and charges deal with past wrongs. *In Re Murphy*, 560 F.2d 326, at 337 (8th Cir.1977). Whatever privileged discussions relating to the charged offense in Count I arose between May, 1988 and the date of the indictment, then, relates to past wrongdoing. As a result, the government cannot demonstrate a *prima facie* showing that the communications were engaged in for the express purpose of the commission of ongoing or future crime. *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277 (8th Cir.1984); and *In Re Berkley and Co.*, 629 F.2d 548 (8th Cir.1980).

With respect to the attorney-client communications predating representation on this matter, the court observes that they would have occurred coterminously with the conduct alleged in Count I to be conspiratorial and criminal. Because there is no fair and clear way to separate out which aspects of the privilege may be overridden at trial by the crime-fraud exception, and because defendant Tigue begins trial, under *Rock v. Arkansas* and the rules of professional conduct, with the right to employ those communications in his defense, it would be inappropriate to require a joint trial of these two defendants. Either or both is so likely to suffer some prejudicial consequence, that the interests of fair trial and long-run judicial economy require a severance of defendant Tigue for trial on Count I of the indictment. If the remaining defendants are first tried on the conspiracy count, there is no possibility that defendant Tigue's attempts to have privileged statements admitted in his defense will impair any of defendant Ferris Alexander's trial rights.

Accordingly, dismissal should not be granted as a remedy for this motion, but severance of defendant Tigie for trial is ordered.³

3. Improper Offense Charged

Defendant Ferris Alexander argues for dismissal of Count I on the grounds that the indictment cannot properly charge a *Klein* conspiracy in view of the availability of a conspiracy to violate 26 U.S.C. § 7206(1). That statute prohibits the filing of a false tax return, making it a felony to do so.

This motion is readily disposed of by a reading of Count I and its allegations, and by considering the argument of the government that the conspiracy count charges far more than an unlawful agreement to file false returns. It is in fact alleged as part of the conspiracy that there were periods where no returns were filed, and that complicated transactions and entities were established to avoid defendant Alexander's obligation to file. The conduct alleged is indeed far more pervasive, and sounds in fraud, rather than the more narrow offending conduct necessary to proof of the offense of § 7206(1).

³ The court has, in addressing the issues in this motion, reviewed the brief submitted by the Minnesota Civil Liberties Union as *amicus curiae*. It has found, however, that the issues were more fully developed and related to relevant facts by the briefs of the parties. It has also, over the objection of defendants, considered the grand jury transcripts *in camera* in conjunction with the issue of the crime-fraud exception. *Zolin*, 109 S.Ct. at 2630.

Dismissal on this basis should be denied.

4. James Hearing

The Fifth Circuit Court of Appeals in *United States v. James*, 590 F.2d 575, cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), established a procedure prerequisite to the offering of coconspirator statements by the government at trial. Defendants seek an order that such a preliminary adjudication of the admissibility of coconspirators statements be made in this case, prior to trial.

This Circuit has squarely rejected this approach. *Llach v. United States*, 739 F.2d 1322 (8th Cir.1984); and *United States v. Bell*, 573 F.2d 1040 (8th Cir.1978). In fact, the subsequent history of *James* itself has recognized the onerous and repetitive nature of any requirement that a conspiracy case be presented in a minitrial to the court before actually being tried to the jury. It has, as a result, been modified to establish an order of proof for trial, instead. *Id.* at 578. Moreover, the Supreme court, in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), has allowed trial courts to consider the contents of coconspirator statements themselves in making preliminary determinations under Rule 801(d)(2)(E) of the Federal Rules of Evidence.

No such pretrial "*James*" hearing will be granted here.

III. GRAND JURY MATTERS

Defendants, especially defendant Tigie, urge the court to dismiss the indictment due to a pattern of fatal

irregularities in the grand jury proceedings in this matter. The challenges include a claim of prosecutorial misconduct in interfering with the independence and deliberations of the grand jury, as well as claims that the grand jurors were erroneously instructed in the law by virtue of omissions regarding the First Amendment, and the failure of the prosecutors to present exculpatory evidence. The defendants seek disclosure of the grand jury transcripts in order to further develop this basis for dismissal. To the extent that any *in camera* review has been conducted without disclosure of the same materials to defendants, they object.

The government has supplied *in camera* a full transcript of the grand jury proceedings, including witness testimony, dialogue between jurors and prosecutors, and instructions of the law. It has also certified that the transcript is a complete one of all proceedings in this matter. After a review of the *in camera* materials and considerations of the parties' legal arguments, along with the presumption of regularity attached to grand jury proceedings - *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), and *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) - the court concludes that this group of motions is without merit and should be denied.

The prosecutor may not engage in fundamentally unfair tactics or mislead a jury. *United States v. Lane*, 716 F.2d 515 (8th Cir.1983). To the extent that such misconduct occurs before a grand jury, it may constitute a basis for dismissal of an indictment. Manifestly improper conduct may justify that remedy. See *United States v. Babb*, 807 F.2d 272 (1st Cir.1986). However, before misconduct may

serve as the predicate for dismissal, it must be established that the independence of the grand jury, in making its decision to indict, was thereby tainted. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988); and *United States v. Hintzman*, 806 F.2d 840 (8th Cir.1986). Although the primary challenges to the indictment in *Bank of Nova Scotia* arose in the context of violations of grand jury procedure, the indictment was also challenged on the basis of an alleged constitutional violation. 108 S.Ct. at 2376. Thus the test of taint on the independence of the grand jury applies equally to allegations of constitutional infractions. E.g. *United States v. Benjamin*, 852 F.2d 413, 420 (9th Cir.1988) (no prosecutorial misconduct warranting dismissal of indictment where prosecutor's questions consistently elicited Fifth Amendment responses); *United States v. Talbot*, 825 F.2d 991, 998 (6th Cir.1987), *cert. denied*, 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 860 (1988) (dismissal of indictment for alleged constitutional violation warranted only upon demonstration of prejudice); see also *United States v. Zanger*, 848 F.2d 923, 925 (8th Cir.1988) (no dismissal of indictment warranted for prosecutor's failure to instruct jury on obscenity standard). Accordingly, then, only if there is grave doubt that the decision to indict was free from such violations is dismissal in order. *Bank of Nova Scotia*, 108 S.Ct. at 2374. As discussed above, even misconduct of constitutional proportion does not ordinarily call for dismissal, *Morrison*, and suppression of evidence or some other lesser remedy should be ordered.

Defendant Tigue presented testimony that his secretary received an anonymous call from a person representing himself to be a grand juror. The call was received on

July 10, 1989, after the filing of the indictment. The caller related that when he had expressed serious question about rendering an indictment against defendant Tigie, that Assistant United States Attorney Paul Murphy had told him to "shut up." In conjunction with the prosecutor's alleged failure to provide proper instruction on the law and to present exculpatory evidence, defendant Tigie urges the court to conclude that there was misconduct preventing an independent decision on his indictment.

Rule 6(e)(1) of the Federal Rules of Criminal Procedure requires that all proceedings before the grand jury, except for deliberation and vote, be stenographically recorded. The *in camera* submissions and certification attending it of completeness, demonstrate that such transcription occurred in this case. Nowhere in the numerous dialogues between the prosecutor and grand jurors is there anything which nearly resembles the conversation attributed to the anonymous caller. There is no credible basis of record upon which to conclude that the caller was in fact a grand juror, or that the alleged conversation ever occurred. The transcripts justify the conclusion that this claim is without foundation, and that therefore there is no further particularized need for disclosure of the grand jury proceedings. *Beatrice Foods Co. v. United States*, 312 F.2d 29 (8th Cir.1963).

With this core allegation found to be unsubstantiated, the totality of alleged misconduct disintegrates into several lesser unrelated, and common attacks on grand jury proceedings. First is the claim, disposed of above in the discussion of the conspiracy count, that neither defendant Tigie nor defendant Ferris Alexander was forewarned of the former's impending indictment, or status as a subject

of the investigation. As discussed above, the severance remedy appropriately ameliorates the difficulties generated by that circumstance, and dismissal is not warranted even if a wrong were somehow committed in that regard.⁴

With regard to the adequacy of instructions on the law, as presented to the grand jury, defendants focus largely on omission of the first Amendment doctrines of the right of pseudonymity and anonymity as set forth in *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) and its progeny. The *in camera* submissions contain transcription of the instructions provided to the grand jury, and upon review, the court observes that they include the essential elements of each offense contained in the indictment, and elaboration as to several matters within those elements. There is, as such, no erroneous or misleading instruction. The omission of instructions as to expected defenses does not fatally infect the grand jury proceeding or the indictment. *Lopez v. Riley*, 865 F.2d 30 (2nd Cir.1989); *United States v. Lincoln*, 630 F.2d 1313 (8th Cir.1980); *United States v. Camp*, 541 F.2d 737 (8th

⁴ While the government contends that no putative defendant is legally entitled to a so-called "target warning." *United States v. Washington*, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977); *United States v. Burke*, 781 F.2d 1234 (7th Cir.1985), it is the court's view that the type of disclosure urged by defendants would have avoided the ensuing complications in this prosecution. That could have been accomplished early in the grand jury proceedings either by a motion to disqualify defendant Tigie as counsel, or by motion for relief from grand jury secrecy pursuant to Fed.R.Crim.P. 6 (e)(3)(C). At any rate, resolution of that subissue is not essential to disposition of the motion.

Cir.1976). Moreover, the *in camera* review and indictment make it clear that the government contends that Count I is supported by probable cause as to the motive or purpose of the conspiracy. If defendant Tigie contends that another contrary purpose defeats the *mens rea* element, that is for him to present at trial, should he so choose. For now, however, the question of the accuracy of the law, as it was presented to the grand jurors, centers on probable cause for indictment. *Costello*, 350 U.S. 359, 76 S.Ct. at 406. It is clear that the facts presented to the grand jurors and the instructions of law properly focused their attentions in that regard.

Last is the question of presentation of evidence which defendants contend is exculpatory, and their claim that omission of this evidence fatally misled the grand jury. Well-established precedent makes it clear that there is no obligation on the part of the prosecutor to present the target's explanation for the conduct in issue. *United States v. Civella*, 666 F.2d 1122 (8th Cir.1981). *Accord United States v. Ismaili*, 828 F.2d 153 (3rd Cir.1987), *cert. denied*, 485 U.S. 935, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988); *United States v. Wilson*, 798 F.2d 509 (1st Cir.1986); and *United States v. North*, 708 F.Supp.370 (D.C.1988). In this matter, it is clear on this record that the allegedly exculpatory material is indeed the essence of the defense in the case. Whether it carries the day will be determined as it should, by the empaneled petit jury. It is not so evidently exculpatory that it defeats the probable cause underlying the indictment, or gives rise to any prosecutorial obligation to present it to the grand jury.

Under these circumstances, there is not a demonstrated, particularized need to breach the legal secrecy

accorded grand jury matters, as required in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979), and *In re Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281 (8th Cir.1978).

As a consequence, defendants' motions relating to grand jury proceedings should be denied.

IV. SUPPRESSION MOTIONS

The most substantial suppression question here involves Fourth Amendment issues regarding the multiple search warrants, and the large volumes of evidence seized in their execution. Although those warrants have been available for examination and copying by defense counsel since the time of indictment, and although the court ordered briefing on the particularized defects alleged about the warrants and on standing to challenge the warrants, all that is now before the court is a boilerplate motion to suppress, boilerplate motions to join the motions of codefendants, and the government's argument that the motions should be denied because defendants have, for all intents and purposes, not gone forward despite ample time and the court's warnings. Defendants' counsel represent to the court that in the confusion of substitution of counsel, which occurred during the briefing schedule, these briefs were not prepared. Despite a hesitation to reopen the pretrial motions stage of this matter, suppression of evidence seized by warrant is too fundamental a motion to resolve by the equivalent of default. Accordingly, a new briefing schedule and hearing date will be established for those issues alone.

The remaining suppression dispute deals with tape recorded conversations obtained by the government, involving various of the defendants. None of the conversations involved custodial interrogation, and each was the result of consensual monitoring by one of the participants in the conversation. Consequently, there is no basis for suppression of the contents of any of those tapes. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *United States v. Craig*, 573 F.2d 455 (7th Cir.1977), cert. denied, 439 U.S. 820, 99 S.Ct. 82, 83, 58 L.Ed.2d 110 (1978); and *United States v. McMillan*, 508 F.2d 101 (8th Cir.1974), cert. denied, 421 U.S. 916, 95 S.Ct.1577, 43 L.Ed.2d 782 (1975).

No other confessions or statements were provided by any of the defendants to any law enforcement agent.

In sum then, disposition of the motion to suppress evidence obtained by search and seizure is reserved until further briefing and hearing, the motion to suppress the consensually recorded conversations should be denied, and the remainder of the suppression motions denied as moot on the government's representation that no other confessions or statement to law enforcement officers were made.

V. SUPPRESSION OF MILAVETZ TESTIMONY

Defendant Ferris Alexander seeks suppression of the testimony at trial of witness Robert Milavetz. The basis for the motion is an assertion of the attorney-client privilege. The issues are must akin to those arising in terms of

defendant Tigue's potential testimony regarding his attorney-client relationship with defendant Ferris Alexander. Witness Milavetz preceded defendant Tigue as counsel for Ferris Alexander, and served in that role for a period of years, representing Ferris Alexander much as defendant Tigue, in litigation, business negotiations, and real estate transactions. The government opposes the motion, again asserting the crime-fraud exception to the privilege, and claiming waiver of the privilege.

The court has reviewed *in camera* both the grand jury testimony of witness Milavetz, and the transcript, briefings, and Order of Senior United States District Judge Edward Devitt in connection with those grand jury proceedings. This review has been made over defendant's objection to the court's examination of these underlying materials. Under *United States v. Zolin*, ___ U.S. ___, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), and *Beatrice Foods Co. v. United States*, 312 F.2d 29 (8th Cir.1963), the Court deemed the review to be both necessary and proper.

As part of Judge Devitt's order, he determined that defendant Ferris Alexander had waived any claim of privilege to the testimony of Milavetz, because he had had fair notice of the proceedings before Judge Devitt, set for March 3, 1989, and failed to appear to assert his privilege. With knowledge that this was an initial step in procuring evidence for a serious criminal prosecution, this failure to appear can be construed in no other meaningful manner other than the waiver which Judge Devitt found. In comparison to potential testimony of defendant

Tigue, efforts have been repeatedly made to assert the privilege.⁵

Although Judge Devitt's ruling of waiver and this court's agreement with it is strong medicine as to arguably privileged materials, it is the necessary result. It makes unnecessary any resolution of the arguments regarding the crime-fraud exception. However, this court observes that Judge Devitt did apply the crime-fraud exception to the entirety of the Milavetz testimony in his March, 1989, order and this court sees no reason in the submissions to depart from that order. It notes, however, a distinction with respect to defendant Tigue on this question, arising from defendant Tigue's unique role as counsel regarding this very matter from May, 1988 until the return of the indictment. Even if the crime-fraud exception is found to apply in some degree with respect to defendant Tigue's attorney relationship, that finding does not thereby justify an abrogation of the privilege as to all dealings between the two, as attorney and client. *United States v. Valencia*, 541 F.2d 618 (6th Cir.1976).

For these reasons, the motion to suppress the Milavetz testimony should be denied.

⁵ This is so despite the government's contention of waiver regarding the Tigue affidavit. Defendant had no forewarning of the filing of the affidavit, and adequately prompt measures were taken to enter objection to and provide for sealing of the affidavit. The court declines to find waiver of the privilege regarding defendant Tigue.

VI. SEVERANCE - OF DEFENDANTS AND COUNTS

The severance motions are numerous in this case, and encompass claims of improper joinder of defendants and counts under the rules of criminal procedure, prejudicial joinder arising from various privilege claims, resultant unavailability of codefendants as witnesses, inconsistent defenses, disparity of evidence admissible against defendants in terms of the relative scope of their involvement, spillover effect, and prejudicial impact of the obscenity related counts on the tax-related counts.

Defendant Tigue's arguments regarding severance need no further discussion because the privilege issues arising from his joint indictment with his client have been found to warrant his severance from the other defendants.

It is most logical to determine if the entire indictment, *sans* defendant Tigue, may and should properly be tried in a single case, before resolving the questions regarding severance of defendants. In resolving the joinder of counts in an indictment, the court should not entertain a mini-trial on the charges, with opposing evidence offered by the parties as to the propriety of joinder. Instead, the allegations on the face of the indictment should be determinative of the joinder of counts. *United States v. Massa*, 740 F.2d 629 (8th Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); and *United States v. Cook*, 99 F.R.D. 252 (E.D.Tenn.1982).

A facial reading of the indictment provides a compelling basis for concluding that the charges arise from a series of acts and transactions "connected together or constituting parts of a common scheme or plan."

Fed.R.Crim.P. 8(a). There is, on the face of the indictment, an integration and dependence of the counts. As the government asserts, the fluid identities of business forms and involvement of various persons charged in Count I under the *Klein* conspiracy, is the functional equivalent of the enterprise charged in Counts VI, VII and VIII under the RICO statute. Likewise, the "business" charged in the counts under 18 U.S.C. § 1466 is conterminous with the preceding conspiracy and RICO elements. The substantive wrongful activity alleged to be undertaken by defendants in those various business forms is claimed in the indictment to be directed at the singular purpose of trafficking in illegally obscene materials without detection and financial obligation to the taxing authorities. As a consequence, the substantive tax and obscenity counts are integral to, and constitute partial proof of the other charges. This unity or commonality of the various counts sustains their joinder in a single indictment. *Schaffer v. United States*, 362 U.S. 511, 514, 80 S.Ct. 945, 947, 4 L.Ed.2d 921 (1960); *United States v. Patterson*, 819 F.2d 1495 (9th Cir.1987); *United States v. Bibby*, 752 F.2d 1116 (6th Cir.), cert. denied, 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1985); and *United States v. Phillips*, 664 F.2d 971 (5th Cir.), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1981). Likewise, the self-evident commonality of proof on these charges makes their joint trial the preferable alternative. *United States v. Garcia*, 785 F.2d 214, 220 (8th Cir.), cert. denied 475 U.S. 1143, 106 S.Ct. 1797, 90 L.Ed.2d 342 (1986); and *United States v. Brim*, 630 F.2d 1307 (8th Cir.1980). This is so in spite of any argument that the obscenity related proof may so offend jurors that

they will be unable to separately and independently consider the tax-related charges. Because the obscenity-related charges are so integral to the conspiracy count and its factual context, this argument for severance is not well taken. *United States v. Garcia*, 785 F.2d at 220 (8th Cir.) (proof relevant to charges against one defendant interwoven with proof relevant to another defendant but no indication that jury was confused).

For these reasons then, the counts of the indictment should be tried together in a single trial. Whether any of the defendants should be separately tried on the group of charges against him or her is the next step in the severance analysis.

The initial question is the propriety of joinder under Fed.R.Crim.P. 8(b). The rule specifies that all defendants need not be charged in all counts, and may be joined in an indictment when they are alleged to have participated in "the same series of acts or transactions." As discussed above, the charged offenses do constitute such a connected series. The alleged involvement on the face of the indictment of each of the defendants (aside from defendant Tigue, who is charged in only one count), sufficiently demonstrates the connection of each in this series of transactions that the joinder of defendants is proper. *Bibby*, 752 F.2d 1116. When viewed in conjunction with the rule that coconspirators should be tried in a single trial. *United States v. Arenal*, 768 F.2d 263 (8th Cir.1985); and *United States v. DeLuna*, 762 F.2d 897 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985), it appears that the motions for severance of defendants should be denied.

Before reaching that conclusion, defendants' claims of prejudicial joinder made pursuant to FRCrP 14 must be taken up. The relative complexity of this indictment, and the variance in the roles of each of the defendants does not stand in the way of a joint trial. Here, the number of defendants is relatively small, and their relationship to the charged offenses relatively discrete. The complexity of the charges themselves will continue whether the trials are joint or several. The ability of a jury to compartmentalize defendants and proof is not seriously in question here. *Eg. DeLuna*, 763 F.2d at 919; and *United States v. Miller*, 725 F.2d 462 (8th Cir.1984). Similarly, the comparatively greater weight of the evidence against some defendants, or the greater alleged involvement by some, does not call for severance even if the jury has heard and considered such evidence. *United States v. Robinson*, 774 F.2d 261, 267 (8th Cir.1985); and *United States v. Boyd*, 610 F.2d 521, 525 (8th Cir.1979), *cert. denied*, 444 U.S. 1089, 100 S.Ct. 1052, 62 L.Ed.2d 777 (1980). Nor does the admissibility of evidence against some but not others. *Robinson*, 774 F.2d at 267. *United States v. Reeves*, 674 F.2d 739, 746 (8th Cir.1982).

Because there are no post-conspiracy statements involved as proof in this case (see discussion of suppression motions above), the sometimes difficult severance issues arising in terms of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), are not present here.

The remaining issues also do not change the conclusion that a joint trial of all defendants should be had, with the exception of defendant Tigie. Although there are claims that a joint trial may deprive some defendants

of the testimony of codefendants, the requisite showing has not been made to sustain a severance on this basis. Prerequisite to such a remedy, a defendant must present actual proof that a given codefendant has committed himself to testify, and that the testimony is exculpatory and material to the defense. *United States v. Garcia*, 785 F.2d 214; and *United States v. Starr*, 584 F.2d 235, 238 (8th Cir.1978).

Likewise, the claims of potentially antagonistic defenses are not adequately of record to call for severance. It has not been demonstrated that for a jury to believe one defense, it will necessarily have to disbelieve another. *United States v. Massa*, 740 F.2d 629; *United States v. Kaminski*, 692 F.2d 505 (8th Cir.1982). Defendant Dolores Alexander's contention that she knew nothing of the affairs of the businesses set forth in the indictment does no more than portray a defense of ignorance. There is nothing demonstrated about the inconsistency of her lack of knowledge with any defense to be asserted by other codefendants.

Last, are the claims by both Ferris and Dolores Alexander that their spousal privilege requires their severance for trial. As elucidated by the Supreme Court in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980), the privilege has two distinct components: the privilege against testifying over one's objection, against one's spouse; and the separate privilege protecting communications during the course of the marriage. The Supreme Court has clearly held a spouse who chooses to do so, may testify despite the nonwaiver of the privileges by the opposing spouse.

The government claims that it has made a sufficient *prima facie* showing of the crime-fraud exception to the spousal privilege for a holding that it has been overcome. It urges therefore that severance on this basis should be denied. A review of the application of the crime-fraud exception to the spousal privilege shows it to have been applied and upheld in the majority of circuits that have been confronted with the question. *United States v. Picciandra*, 788 F.2d 39 (1st Cir.), *cert. denied*, 479 U.S. 847, 107 S.Ct. 166, 93 L.Ed.2d 104 (1986); *United States v. Estes*, 793 F.2d 465 (2nd Cir.1986); *United States v. Ammar*, 714 F.2d 238 (3rd Cir.1983); *United States v. Broome*, 732 F.2d 363 (4th Cir.), *cert. denied*, 469 U.S. 855, 105 S.Ct. 181, 83 L.Ed.2d 116 (1984); *United States v. Mendoza*, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988, 99 S.Ct. 584, 58 L.Ed.2d 661 (1978); *United States v. Kahn*, 471 F.2d 191 (7th Cir.1972), *rev'd other grounds*, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 and *United States v. Price*, 577 F.2d 1356 (9th Cir.1978), *cert. denied*, 439 U.S. 1068, 99 S.Ct. 835, 59 L.Ed.2d 33 (1979). This overwhelming weight of authority, and the absence of opposing authority in this circuit call for the application of the exception in this case.

The spouses here are charged jointly in both a *Klein* conspiracy and racketeering enterprise. The *in camera* submissions, consisting of the grand jury testimony, as compared against the face of the indictment, demonstrate a *prima facie* showing of the crime-fraud exception. As with the discussion of this exception and its application to the attorney-client privilege, it should not be the case that there is a wholesale abrogation of the privilege surrounding the entirety of Ferris' and Dolores' marital communications. Only those involved in the perpetration of a

crime or fraud should be found to overrule any assertion of privilege. *Valencia*, 541 F.2d at 621. Because the government should not logically be seeking affirmative proof, or impeachment through cross-examination into anything beyond this zone, the severance request should be denied.

Based upon the foregoing, the evidence adduced and submitted *in camera*, the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to find the forfeiture provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;
2. Defendants' motion to find the pretrial restraining order provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;
3. Defendants' motion to dismiss Counts VI, VII, and VIII of the indictment on the foregoing grounds be DENIED;
4. The forfeiture provisions of the indictment be dismissed with prejudice;
5. The pretrial restraining order presently in effect be vacated, and any sum expended by defendants for its monitoring be restored to them within thirty days hereof, or upon any order of the trial court sustaining this recommendation;

6. Defendants' motions to otherwise find the RICO statute, when applied to a prosecution based upon predicate offenses of obscenity, unconstitutional under the First Amendment be DENIED;

7. Defendants' motions to find the RICO statute, as applied to a prosecution based upon predicate offenses of obscenity, to be unconstitutional in violation of the Ex Post Facto Clause be DENIED;

8. Defendants' motions to find the obscenity standard underlying the charged RICO predicate offenses and the offenses charged pursuant to 18 U.S.C. §§ 1465 and 1466, unconstitutional under the First Amendment by DENIED;

9. Defendants' motion to dismiss the indictment on grounds of equitable estoppel be DENIED;

10. Defendants' motion to dismiss the counts alleged under §§ 1465 and 1466 on grounds of temporal remoteness be DENIED;

11. Defendants' motion for leave to present an affirmative defense that he in good-faith mistakenly believed the materials in issue not to be obscene be DENIED;

12. Defendants' motion to dismiss Count I of the indictment on grounds of duplicity be DENIED;

13. Defendants' motion to dismiss Count I of the indictment on grounds of irreparable harm to the Sixth Amendment right to counsel and interference with the attorney-client privilege be DENIED;

14. Defendants' motion to dismiss Count I of the indictment on the grounds that it is properly chargeable

only as a conspiracy to violate 26 U.S.C. § 7206(1) be DENIED;

15. Defendants' motion to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury be DENIED;

16. Defendants' motion to suppress evidence obtained by search and seizure be, until such time as the matter is briefed and heard, TAKEN UNDER ADVISEMENT;

17. Defendants' motion to suppress statements, including the product of electronic surveillance, be DENIED; and

18. Defendants' motion to suppress trial testimony of witness Robert Milavetz be DENIED.

DATED: September 30, 1989.

/s/ Janice M. Symchych
Janice M. Symchych

United States Magistrate

ORDER

Based upon the foregoing, the evidence adduced and submitted *in camera*, the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS HEREBY ORDERED that:

1. Defendants' briefs regarding the motion to suppress evidence obtained by search and seizure shall be submitted to United States Magistrate Patrick McNulty,

and served on the United States, no later than October 20, 1989, with no further leave for extension;

2. The government's responsive brief regarding the motion to suppress evidence obtained by search and seizure shall be submitted and served no later than October 27, 1989;

3. Hearing on the motion to suppress evidence obtained by search and seizure, including all testimony and argument, is set for 10:00 a.m., November 14, 1989, before United States Magistrate Patrick McNulty in Room 530 United States Courthouse at 110 South Fourth Street in Minneapolis, Minnesota. All counsel and parties shall be present;

4. Defendant Tigue's motion for severance and separate trial from the remaining defendants is GRANTED;

5. Trial of the remaining defendants shall proceed prior to trial of defendant Tigue, to ensure that the trial of defendant Ferris Alexander, Sr. has concluded prior to any proposed use by defendant Tigue of materials deriving from their attorney-client relationship;

6. Defendants' motion to sever the tax-related counts of the indictment from the RICO and obscenity-related counts is DENIED;

7. Defendants' motions for severance from one another for trial, with the exception of defendant Tigue, are DENIED;

8. Defendants' motion for a *James* hearing regarding Count I of the indictment is DENIED;

9. Defendants' motion for disclosure of grand jury materials is DENIED;

10. Defendants' motion for disclosure of confidential informers is DENIED;

11. Defendants' motion for a list of government witnesses is DENIED;

12. Defendants' motion for pretrial disclosure of Jencks Act materials, to the extent that the government shall produce said materials 10 calendar days prior to trial, is GRANTED;

13. Defendants' motion to require government agents to retain rough notes is GRANTED;

14. Defendants' motions for discovery of Rule 16 and exculpatory materials, to the extent they cover information within the scope of FRCrP 16 and *Brady v. Maryland* and its progeny, are GRANTED;

15. Defendants' motion for disclosure of government agreements with witnesses are GRANTED;

16. Defendants' motion for notice of intent to utilize 404(b) evidence is DENIED;

17. Defendants' motion for a bill of particulars is DENIED;

18. Defendants' motions relating to jury selection, including the number of per-emptory challenges, the degree of information to be disclosed regarding prospective jurors, and the method of voir dire, are RESERVED FOR THE TRIAL COURT.

DATED: September 30, 1989.

/s/ Janice M. Symchych
Janice M. Symchych
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA
V.
FERRIS J. ALEXANDER, Sr.

JUDGMENT INCLUDING
SENTENCE UNDER
THE SENTENCING
REFORM ACT
Case Number
4-89-85(1)

(Name of Defendant)

Deborah Ellis and
Robert E. Smith
Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s)_____

 X was found guilty on count(s) 1-9, 20-25, 28, 30, 31, 33-37, 39, 41 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
SEE ATTACHED		

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 10-19, 26, 27, 29, 32, 38, 40, and is discharged as to such count(s).

Count(s) _____ (is)(are) dismissed on the motion of the United States.

X The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is ordered that the defendant shall pay to the United States a special assessment of \$ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's	<u>August 6, 1990</u>
Soc. Sec. Number:	Date of Imposition of
468-14-0838	Sentence
_____	<u>/s/ James M. Rosenbaum</u>
Defendant's	Signature of
mailing address:	Judicial Officer
4608 Ellerdale Road	James M. Rosenbaum
_____	<u>U.S. District Judge</u>
Minnetonka, Minnesota	Name & Title of
55345	Judicial Officer
_____	<u>Aug 13th, 1990</u>
Defendant's	Date
residence address:	
Same	

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Count Numbers</u>
18 U.S.C. § 371	Conspiracy to Defraud IRS	1
26 U.S.C. § 7206(1)	Filing False Tax Returns	2, 3
18 U.S.C. § 1962(d)	Conspiracy to Violate RICO	4
18 U.S.C. § 1962(a)	Investing Racketeering Proceeds	5
18 U.S.C. § 1962(c)	Conducting RICO Enterprise	6
18 U.S.C. § 1465	Interstate Transportation of Obscene Material for Sale	7, 8, 9, 20, 21, 22, 23, 24, 25, 28, 30, 31
18 U.S.C. § 1466	Sale of Obscene Material	33, 34, 35, 36, 37, 39
42 U.S.C. § 408(g)(2)	Use of False Social Security No.	41

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 72 months as to Counts 4, 5, and 6, said sentences to run concurrently; 60 months as to Counts 1, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, said sentences to

run concurrently with each other and concurrently with the sentences imposed on Counts 4, 5, and 6; 36 months (three years) as to Counts 2, 3, 20, 21, 22, 23, 28, 30, 31, and 41, said sentences to run concurrently with each other and concurrently with the sentences imposed on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39.

X The Court makes the following recommendations to the Bureau of Prisons:

The federal facility at Rochester, Minnesota, as the place for service of sentence.

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

___ at ___ a.m.
___ p.m. on ___

___ as notified by the Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

___ before 2 p.m. on August 28, 1990.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three years as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, said.

Sentences of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and will comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be

a condition of supervised release that defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess any firearms or dangerous weapons.

The defendant shall submit to periodic drug testing at the direction of the probation office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of \$ 100,950 , consisting of a fine of \$ 100,000 and a special assessment of \$ 950 .

X These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

\$50 special assessment, per count, as to Counts 1, 4, 5, 6, 7, 8, 9, 20, 23, 24, 25, 31, 33, 34, 35, 36, 37, 39, and 41.

\$100,000 aggregate fine as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39.

This sum shall be paid X immediately.
as follows:

— The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

- The interest requirement is waived.
- The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

IS ADJUDGED AND ORDERED THAT:

As to Courts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, defendant shall pay the costs of his incarceration and supervised release. These amounts shall be: \$1,415.56 per month for the period of incarceration, and \$96.66 per month for the period of supervised release.

Defendant shall forfeit property and proceeds and pay costs of prosecution as set forth in this Court's order dated August 6, 1990. The August 6, 1990, order is hereby incorporated into this judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-85

UNITED STATES OF AMERICA,)	
Plaintiff,)	ORDER AND
)	JUDGMENT OF
v.)	FORFEITURE
)	
FERRIS J. ALEXANDER, SR.,)	Filed Aug. 6, 1990
and WANDA MAGNUSON,)	
Defendants.)	

WHEREAS, in the Indictment in the above-entitled case, plaintiff, the United States of America, sought the forfeiture of certain properties of defendant Ferris J. Alexander, Sr., (hereinafter referred to as the "defendant") pursuant to 18 U.S.C. § 1963;

AND WHEREAS, on May 23, 1990, a jury found the defendant guilty under 18 U.S.C. § 1962(a), (c) and (d);

AND WHEREAS, on May 25, 1990, the same jury found that the defendant has certain rights and interests in properties listed below which interests were used by the defendant to establish, operate, control, conduct or participate in the conduct of an enterprise and which property rights afforded him a source of influence over the enterprise pursuant to 18 U.S.C. § 1963(a)(2);

AND WHEREAS, on June 25, 1990 the United States submitted its claim, to the Court, of forfeiture under 18 U.S.C. § 1963(a)(1) and (a)(3), and this Court having found that the defendant has acquired and maintained interests in properties listed below in violation of Section

1962 and that said properties constitute or are derived from, proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962;

NOW THEREFORE IT IS ORDERED that the defendant's interests and rights in and to the following properties are forfeited to the United States of America, effective as of the date of this order:

1. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 614-616 Hennepin Avenue, Minneapolis, legally described as all of Lot 9, Block 3, Hoag and Bell's Addition, Hennepin County, Minnesota, and commonly known as the American Empress Theater and Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

2. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 311-315 East Lake Street, Minneapolis, legally described as Lots 38 through 41 inclusive, State Addition, Hennepin County, Minnesota, and commonly known as the AB Distributors, pursuant to 18 U.S.C. § 1963(a)(1); (a)(D); and (a)(3).

3. Real property, including any buildings, improvements, appurtenances and fixture thereof located at 739-743 East Lake Street, Minneapolis, legally described as

Lots One (1), Two (2), Three (3) and the North ten (10) feet of Lot Four (4) Block One (1) Chicago-Lake Park Addition to Minneapolis, except all that part of Lots One (1), Two (2), Three (3) and Four (4), Block One (1), Chicago-Lake Park

Addition to Minneapolis, described as follows: Beginning at the Northwest corner of said Lot One (1); thence South along the West line-of Lots One (1), Two (2), Three (3) and Four (4) to a point ten (10) feet South of the Northwest corner of said Lot Four (4); thence East parallel with the North line of said Lot four (4), fifty-five (55) feet; thence North parallel with the West line of said Lots Four (4), Three (3) and Two (2), a distance of seventy-nine and sixty-five hundredths (79.65) feet; thence West parallel with the North line of said Lot Two (2), a distance of four and fifty-six hundredths (4.56) feet; thence North parallel with the West line of said Lot Two (2), a distance of one (1) foot; thence West parallel with the North line of said Lot Two (2), a distance of five and seventy-three hundredths (5.73) feet; thence North parallel with the West line of said lots Two (2) and One (1) to a point on the North line of said Lot One (1), said point being forty-four and seventy-one hundredths (44.71) feet East of the point of beginning; thence West along the North line of said Lot One (1) to the point of beginning, and excepting also from the land conveyed hereby, the South five (5) feet of the North ten (10) feet of that part of Lot Four (4), lying East of the West fifty-five (55) thereof.

Also the south thirty (30) feet, front and rear, of lot 4, and the north Ten (10) feet, front and rear, of Lot 5, all in Block 1, Chicago Lake Park Addition to Minneapolis,

and both according to the recorded plat thereof,

all in Hennepin County, Minnesota, and commonly known as the Chicago-Lake Bookstore, pursuant to 18 U.S.C. § 1963 (a)(1); (a)(2)(D); and (a)(3).

4. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 2936-2938 Lyndale Avenue South, Minneapolis, legally described as Lot 10, Auditor's Subdivision No. 187, the four corners of the tract are worked by judicial landmarks according to the plot thereof, Hennepin County, Minnesota, commonly known as the Nicola Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

5. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 315 South Broadway, Rochester, legally described as the Middle One-third of Lot 3, Block 10, Moe and Old's Addition to Rochester, Olmstead County, Minnesota, commonly known as Joey's Adult Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

6. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 319-323 South Broadway, Rochester, legally described as the North One-third of Lot 2, Block 10, the North One-half of the South two-thirds of Lot 2, Block 10; and the South One-third of Lot 2, Block 10, Moe and Old's Addition to Rochester, Olmstead County, Minnesota, commonly known as the Broadway Book II, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

7. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 324-328 1/2 South Broadway, Rochester, legally described as:

Commencing on the East line of Broadway Street, in the City of Rochester, 65 $\frac{1}{2}$ feet North of the north line of College Street, in center of brick wall, there located and running East in center of said wall about 84 feet to a line hereafter described; thence Northerly on that line about 23 feet to a point 88 $\frac{1}{2}$ feet North of the North line of College Street, thence West along the center of party wall about 88 $\frac{2}{3}$ feet to the East line of Broadway Street; thence South to place of beginning, East line above referred to commencing on the North line of College Street 70 feet East of the East line of Broadway Street and running to a point on the South line of Third Street 140 feet East of the East line of Broadway Street. Said College Street is now known as Fourth Street S.E. Subject to party walls and subject to the real estate taxes due and payable in 1971. Together with

The North forty-three and one-half (43 $\frac{1}{2}$) feet of the South Sixty-five and one-half (65 $\frac{1}{2}$) feet of that part of the Mill Reservation of Moe and Olds Addition to the town, now city, of Rochester extending east from the east line of Broadway Street south to a line drawn from a point on the south line of Third Street Southeast one hundred forty (140) feet east of the east line of said Broadway Street South to a point in the north line of Fourth Street Southeast seventy (70) feet east of the east line of said Broadway Street South, subject to and together with party wall rights in the party walls of the buildings on the south and north lines of said lands, all in Olmstead County, State of Minnesota.

said property is commonly known as the Broadway Book I, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

8. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 227 East Third Street, Winona, legally described as the Westerly 24 feet of the Easterly 46 feet of Lot 1, Block 144, original plat to Winona, located upon and forming a part of government Lot 2, Section 23, Township 107 North, Range 7, West of the Fifth Principal Meridian, Winona County, Minnesota, and commonly known as the Ultimate Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

9. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 621-623 University Avenue West, St. Paul, legally described as Lot 30, Block 1, Syndicate No. 1 Addition, Ramsey County, Minnesota, commonly known as The Flick, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

10. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 341-347 East Lake Street, Minneapolis, legally described as Lot 24, Lot 25 and Lot 26, State Addition, Hennepin County, Minnesota, and commonly known as the Lake Street Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

11. All interests, holdings, assets and claims in non-corporate businesses known as:

AB Distributors
The Newspaper Club
Kenneth LaLonde Enterprises
LeRoy Wendling
The Superior Street Company
Express Entertainment

United States Video
 U.S. Video
 United States Video Distributors
 Baker Investments
 American Book Wholesalers
 A.B. Video
 A & B Distributors
 Bell Investments
 American Theater Supply Company
 Video Hits
 AB Distributing
 Magazine and Book Agency

including but not limited to inventory, accounts receivable, business name or names, vehicles, equipment, office furniture, computers, safes, television sets, video cassette recorders, U.S. currency, and all funds credited to the following bank accounts as of May 25, 1990:

a. A bank account held in the name of the Newspaper Club with the Union & Trust Company, Account No. 101084400.

b. A bank account in the name of A.B. Distributors with the First Bank - St. Anthony Falls, Account No. 206-3023-374.

c. A bank account in the name of Broadway Bookstore with the Marquette Bank and Trust, Rochester, Account No. 2389-625.

d. A bank account in the name of U.S. Video with the Marquette Bank and Trust, Rochester, Account No. 2488-925.

e. A bank account in the name of Wabasha Bookstore with the Norwest Bank, Duluth, Account No. 0116-863.

f. A bank account in the name of Ferris J. Alexander with the First Bank Duluth, Account No. 1095-930.

g. A bank account in the name of American Theater Supply and the Gardner Hotel with the Norwest Bank, Duluth, Account No. 116-848.

h. A bank account in the name of Ferris Alexander with the Merchants National Bank of Winona, Account No. 25-873.

i. A bank account in the name of Ferris Alexander, Edward Alexander and/or The American Book Wholesalers with the First Bank - St. Anthony Falls, Account No. 706-2051-334.

j. A bank account in the name of Haista Paska, Inc., d/b/a Video Hits, with the First Bank - St. Anthony Falls, Account No. 206-3027-052.

k. A bank account in the name of A.B. Video with the First Western State Bank, Account No. 44-057.

l. A bank account in the name of United States Video, Inc., and A. B. Distributors with the First State Bank of St. Paul, Account No. 15-05-510.

m. A bank account in the name of Video Hits with the Union Bank & Trust Co., account #101085400).

n. A bank account in the name of Haista Paska, Inc. d/b/a Video Hits with the First Bank - St. Anthony Falls, account #206-3027-052.

o. A bank account in the name of Video Hits with the Merchants National Bank of Winona, account #7-173; pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

12. All rights, interests, holdings and claims in a non-corporate business entity known as The Flick, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

13. All rights, interests, holdings and claims in a non-corporate business entity known as The Wabasha Bookstore a/k/a The Wabasha Adult Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

14. All rights, interests, holdings and claims in a non-corporate business entity known as The Lake Street Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

15. All rights, interests, holdings and claims in a non-corporate business entity known as The Adult Entertainment Center, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

16. All rights, interests, holdings and claims in a non-corporate business entity known as the Chicago-Lake Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

17. All rights, interests, holdings and claims in a non-corporate business entity known as the American Empress Theater and Bookstore a/k/a American Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

18. All rights, interests, holdings and claims in a non-corporate business entity known as Nicola's Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

19. All rights, interests, holdings and claims in a non-corporate business entity known as East Hennepin Video Book & Theater, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

20. All rights, interests, holdings and claims in a non-corporate business entity known as Broadway Book I, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

21. All rights, interests, holdings and claims in a non-corporate business entity known as Broadway Book II, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

22. All rights, interests, holdings and claims in a non-corporate business entity known as Joey's Adult Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

23. All rights, interests, holdings and claims in a non-corporate business entity known as The Ultimate Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

24. All rights, interests, holdings and claims in a non-corporate business entity known as Video Hits, Winona, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

25. The above-mentioned bank accounts (paragraph 15) and all funds credited to the accounts as of the date of this indictment and traceable from the accounts as of the date of and subsequent to the indictment together with the contents of any safe deposit box maintained by and on behalf of Ferris J. Alexander, pursuant to Title 18, United States Code, Section 1963(a)(1) and (a)(3).

26. The following personal property and the proceeds thereof: all 8 mm projectors, television monitors, coin boxes and their contents, safes, video cassette tape players, video cassettes, magazines, other printed material, shelving and display material, chairs, tables, office equipment and furniture, cash registers and their contents, U.S. currency, computers, adding machines, and other inventory, pursuant to 18 U.S.C. § 1963(a)(1) and (a)(3).

27. The following motor vehicles: a 1986 Dodge Van, Vehicle Identification No. 2B7FB13H8GK534657; a 1985 Chevrolet Van, Vehicle Identification No. 2GCEG25H2F416185; a 1976 EZ-Load Trailer, Vehicle Identification No. 61200D; pursuant to 18 U.S.C. § 1963(a)(1) and (a)(3).

28. All monies acquired, maintained, or constituting proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962 for the years 1985, 1986, 1987 and 1988 as follows:

(1) 1985 - \$2,011,543.58

(2) 1986 - \$1,856,820.52

(3) 1987 - \$2,484,845.00

(4) 1988 - \$2,557,339.00

TOTAL - \$8,910,548.10

pursuant to 18 U.S.C. § 1963 (a)(1) and (a)(3).

IT IS FURTHER ORDERED that the Attorney General or his designee is authorized to seize the property, to enter said properties by force if necessary, and dispose of it in accordance with law.

IT IS FURTHER ORDERED that the United States shall publish notice of this Order and its intent to dispose of the property in such manner as the Attorney General may direct. Any person, other than the defendant, asserting a legal interest in the property shall, within thirty (30) days of the final publication of this notice, or his receipt of direct written notice, whichever is earlier, petition the Court for a hearing to adjudicate the validity of his alleged interest in the property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

IT IS FURTHER ORDERED that following the Court's disposition of all petitions filed, or if no such petitions are filed following the expiration of the period specified for the filing of such petitions, the United States shall

have their title to the property and may warrant good title to any subsequent purchaser or transferee.

IT IS FURTHER ORDERED that a money judgment shall be entered by the Clerk of Court in favor of the United States and against the defendant, Ferris J. Alexander, in the sum of \$8,910,548.10 and that said judgment shall accrue post-judgment interest from the date of this order at the rate allowable by law.

IT IS FURTHER ORDERED that the United States may apply to this Court for entry of a money judgment to the value of any property forfeited to the United States as set forth herein which property is determined to have been transferred, conveyed or liquidated by or on behalf of the defendant, his nominee or assign, at any time subsequent to the commission of any of the acts giving rise to forfeiture under 18 U.S.C. § 1963, or for such other relief as the Court deems appropriate.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 6th, 1990

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-85

United States of America)
v.) ORDER
) (Filed Aug. 13, 1990)
Ferris J. Alexander, et al.)

Jerome Arnold, Paul W. Murphy, Mary E. Carlson, 110 South Fourth Street, #234, Minneapolis, Minnesota, for the United States.

Robert E. Smith, 10 Universal City Plaza, #1600, Universal City, California 91608; and Deborah Ellis, 345 St. Peter Street, St. Paul, Minnesota 55102; for defendant Ferris Alexander.

Michael McGlennon, 333 Third Avenue South, Minneapolis, Minnesota 55415, for defendant Dolores Alexander.

Joseph Friedberg, 250 Second Avenue South, #205, Minneapolis, Minnesota 55401, for defendant Jefferey Alexander.

Dave G. Roston, 250 Second Avenue South, #225, Minneapolis, Minnesota 55401, for defendant Wanda Magnuson.

This matter is before the Court upon the government's motion for forfeiture, pursuant to 18 U.S.C. §1963(a)(1) and (a)(3). The government also requests payment of its costs of prosecution, pursuant to 28 U.S.C. §§1918 and 1920 and 26 U.S.C. §7206. The defendant was tried by a jury which found him guilty of one count of

conspiracy to commit tax fraud in violation of 18 U.S.C. §371, two counts of filing false tax returns in violation of 26 U.S.C. §7206, one count of conspiracy in violation of the Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §1962(d), two substantive counts of RICO in violation of 18 U.S.C. §1962(a) and (c), twelve counts of interstate transportation of obscene materials in violation of 18 U.S.C. §1465, six counts of selling obscene materials in violation of 18 U.S.C. §1466, and one count of use of a false social security number in violation of 42 U.S.C. §408(g)(2).

The government moves for forfeiture of the assets and proceeds of the racketeering activity and for the costs of prosecuting the tax, RICO, and individual obscenity counts.

Background

By agreement of the parties, a portion of the forfeiture issue was submitted to the jury following trial on the substantive counts. At the conclusion of this bifurcated proceeding, the jury concluded certain interests in property owned or controlled by the defendant were forfeitable pursuant to 18 U.S.C. §1962(a)(2). That section permits forfeiture of "any (A) interest in; . . . or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person established." 18 U.S.C. §1963(a)(2)(A),(D).

The jury determined, however, that some interests, claimed by the government to be forfeit, were not subject to forfeiture under part (a)(2). In particular, the jury found that there was no forfeiture interest as part of the

RICO enterprise in the Adult Entertainment Center; Video Hits, Winona; the Wabasha Adult Bookstore; and the East Hennepin Bookstore.

The government now seeks forfeiture of these same properties, pursuant to parts (a)(1) and (a)(3) of section 1963. Part (a)(1) provides, in relevant part, for forfeiture of "any interest the person has acquired or maintained in violation of section 1962." 18 U.S.C. §1963(a)(1). The final forfeiture provision, part (a)(3), contemplates forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962." 18 U.S.C. §1963(a)(3). RICO's forfeiture provisions are mandatory; section 1963 specifically provides the Court "shall order" forfeiture to the United States. 18 U.S.C. §1963(a).

The government also requests forfeiture of \$8,910,548.10 as proceeds which it calculates to have been acquired directly or indirectly in violation of 18 U.S.C. §1962. This amount represents proceeds of the racketeering activity for the years 1985 to 1988. This sum, along with the other property which the jury determined forfeitable, was charged in the indictment as being subject to forfeiture. Further, the government asks the Court to seize various bank accounts associated with those entities considered by the jury, various items of personal property, equipment and inventory located on those premises, and at least three motor vehicles used by the criminal enterprise. The government contends these items are forfeitable, pursuant to section 1963(a)(1) and (a)(3).

Finally, the government requests the costs of pursuing its case against defendant. The prosecution has advanced an affidavit showing these costs to be \$29,737.84, of which \$16,536.24 is allocated to the tax counts. The government suggests imposition of costs on the tax counts is mandatory pursuant to 26 U.S.C. §7206(5), which provides the Court "shall" impose the costs of prosecution. 26 U.S.C. §7206. The government suggests the remainder of the costs should be imposed pursuant to the general costs statute, 28 U.S.C. §§1918 and 1920. While imposition of costs pursuant to these sections is discretionary, the government argues costs are appropriate in light of the scope of defendant's racketeering activities and the manner in which he attempted to evade prosecution.

The facts of this case have been well documented and need not be repeated here. See *United States v. Alexander*, mem. op. at 1-4 (D.Minn. January 24, 1990); *United States v. Alexander*, mem. op. at 1-3 (D.Minn. July 3, 1990). Beyond the evidence produced at trial, the only additional evidence pertinent to these issues is some nine magazines and 400 videos offered by the government, at a post-trial hearing, to demonstrate the extent of defendant's obscenity empire. The government suggests the Court may consider these items as evidence of the relationship between the racketeering enterprise and the property sought to be forfeited, particularly the proceeds.

Analysis

I. Forfeiture

A. Real Property, Interests in Businesses, Personal Property

1. Jury Verdict Pursuant to Section 1963(a)(2)

As an initial matter, the Court affirms the jury verdict of May 25, 1990, declaring real property and interests in property forfeitable, pursuant to section 1963(a)(2). The jury's determinations are supported by evidence beyond a reasonable doubt as to each finding in the special verdict. These properties are, therefore, declared forfeit to the United States, pursuant to 18 U.S.C. §1962(a)(2).

2. Property Declared Non-forfeitable by the Jury

As discussed, the jury, by its special verdict dated May 25, 1990, concluded the real property and interests in the Adult Entertainment Center; Video Hits, Winona; the Wabasha Adult Bookstore; and the East Hennepin Bookstore were not subject to forfeiture, pursuant to section 1962(a)(2). The jury determined defendant held no interest in these properties. The question presented by the government's motion is whether this property may now be forfeited by this Court by way of either section 1963(a)(1) or (a)(3). The Court must answer in the negative.

Section 1962(a)(2) and sections 1962(a)(1) and (a)(3) are clearly distinguishable. Yet, a properly instructed jury specifically concluded that defendant held no interest in

these properties for purposes of forfeiture, pursuant to section 1962(a)(2). As such, the government's conclusion that the properties were derived from or maintained by the RICO enterprise in accordance with sub-parts (a)(1) and (a)(3) cannot be other than suspect. It is well to recall that two co-defendants, including Dolores Alexander, were acquitted on all counts in this prosecution, including the RICO charges. While it cannot be more than conjecture, the jury may well have determined that Dolores Alexander and the other acquitted party held the interests in these properties and operated the properties outside the scope of, and independently from, the racketeering enterprise.¹

In any case, the Court concludes the evidence produced at trial and afterward was insufficient to support a forfeiture order under any of the section 1963 provisions. Although the government demonstrated some connection between the properties and the racketeering activities, the connection was minimal at best. The proof offered by the government was insufficient to sway the jury as to section 1963(a)(2) and is similarly unpersuasive as to sub-parts (a)(1) and (a)(3). The property sought by the government which was not determined forfeitable by the jury will not be forfeit by this Court.

¹ There was absolutely no evidence produced at trial suggesting co-defendant Wanda Magnuson, the other defendant found guilty of RICO charges, held any interest in the properties.

3. Personal Property, Equipment, and Inventory

The personal property, equipment, and inventory is forfeitable pursuant to either section 1963(a)(1) or (a)(3). Each of these items was identified in the indictment charging the racketeering activity.² The evidence presented at trial and in the ensuing forfeiture hearings makes clear these items were acquired or maintained as part of the racketeering activity in violation of section 1962. Much of the property was undoubtedly derived from proceeds of the ongoing enterprise.

More specifically, the personal property, inventory, and office equipment permitted defendant to carry on his racketeering activity. Defendant used the various items of office equipment to facilitate the sale of obscene materials and the conduct of the RICO enterprise. The personal property – including video cassette recorders, projectors, and furniture – located on the premises of the aforementioned real property and business clearly were maintained by, and used in, the continuing racketeering activity. A cursory review of those videos and magazines supplied by the government reveals that defendant acquired and distributed scores of materials which were similar in nature to those declared obscene. The Court has little doubt the inventory of videos and magazines held at the various properties previously determined forfeitable were part and parcel of defendant's racketeering

² The three automobiles were not specifically identified until trial. The indictment, however, provided the government would seek forfeiture of any motor vehicles associated with the racketeering enterprise.

scheme. As such, they are subject to forfeiture as set forth in the indictment and as provided pursuant to sections 1963(a)(1) and (a)(3).

The three motor vehicles – two vans and a trailer – also were maintained by the activities of the RICO enterprise. The evidence demonstrated the vehicles were purchased by the enterprise for use in the distribution of various materials to defendant's business properties. The vehicles were an integral aspect of the racketeering scheme and are, therefore, properly subject to forfeiture under section 1963(a)(1) and (a)(3).

4. Bank Accounts and Proceeds

The government asks the Court to forfeit bank accounts, all funds credited to and traceable from the accounts, and all safe deposit boxes associated with the business entities in which the jury determined defendant had an interest pursuant to section 1962(a)(2). The government also seeks forfeiture of \$8,910,548.10 as proceeds of the racketeering activity for the years 1985 through 1988. Both the accounts and the total proceeds were alleged as forfeitable in the indictment.

The broad extent of the government's request in this area of forfeiture poses a serious question of the relationship between the dollars generated in the sale or distribution of the videos and magazines declared obscene, and that portion of defendant's enterprises which were not obscene and were, perforce, not illegal. Plainly, there is

little chance that the sale of these few videos and magazines could generate such massive income to the enterprise.

In reply to these concerns, the government supplied the Court with the aforementioned 400 tapes and magazines. The Court has conducted a general review³ of these materials. There is little doubt some of it is of the same quality as that declared obscene. At the same time, much of the material is similar to that charged in those counts as to which the jury acquitted the defendants. The proffered evidence, therefore, is of assistance, but is not dispositive of this issue. Certainly interstate trafficking in obscene materials constitutes the RICO predicates here. But the question remains: Is the jury's verdict, finding a small number of materials to be obscene, sufficient to support such a vast forfeiture? The Court holds the forfeiture is supported by law and the facts of this case.

There is no question the proceeds of a racketeering enterprise are forfeitable, pursuant to section 1963. Part (a)(3) specifically contemplates the forfeiture of proceeds, and the term "interest" has long been defined to include proceeds and profits. 18 U.S.C. §1963(a)(3); *Rusello v. United States*, 464 U.S. 16, 22, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983); *United States v. Robilotto*, 828 F.2d 940, 948 (2d Cir. 1987), cert. denied, 484 U.S. 1011, 108 S.Ct. 7112, 98 L.Ed.2d 662 (1988). The availability for forfeiture

³ The Court reviewed the materials in a less rigorous fashion than is called for in determining "obscenity *vel non*," preliminary to submitting allegedly obscene materials to a jury. The Court has not spent the 450-600 hours which might have been required to view each of the video tapes in its entirety.

of proceeds of the racketeering activity arises out of courts' recognition that RICO forfeiture is an *in personam*, rather than *in rem*, punishment. *Robilotto*, 828 F.2d at 948-49; *United States v. Ginsburg*, 773 F.2d 798, 800 (7th Cir. 1985), *cert.denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). This *in personam* nature places an emphasis on punishment to the criminal "by separating him from his ill-gotten benefits, rather than [on] confiscating 'guilty' items." *United States v. Vogt*, 713 F.Supp. 847, 860 (M.D.N.C. 1987).

In determining which proceeds are subject to forfeiture, the exact identity of dollars, or the tracing of funds, is not required. *Robilotto*, 828 F.2d at 948; *Ginsburg*, 773 F.2d at 801-803. RICO forfeiture, as an *in personam* penalty, deprives the defendant of all profits and proceeds acquired through the racketeering activity, "regardless of whether those assets are themselves 'tainted' by use in connection with the illicit activity." *Ginsburg*, 773 F.2d at 811; *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983). As such, it "does not matter whether the government recovers the identical dollars . . . as long as the amount that the defendant acquired in violation of the statute is known." *Ginsburg*, 773 F.2d at 801. To require tracing would "simply provide an incentive for racketeers to engage in complicated financial transactions to hide their spoils." *United States v. Navarro-Ordas*, 770 F.2d 959, 970 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1200, 85 L.Ed.2d 313 (1986); *Vogt*, 713 F.Supp. at 863. the government's ability to seize forfeitable proceeds may not be "abridged by intervening investment of tainted funds in non-enterprise assets." *Vogt*, 713 F.Supp. at 863.

The forfeiture of all proceeds is an appropriate punishment pursuant to the RICO provisions. To "truly separate the racketeer from his dishonest gains, . . . [RICO] requires him to forfeit . . . the total amount of the proceeds of his racketeering activity regardless of whether the specific dollars received form that activity" are those forfeited. *Ginsburg*, 773 F.2d at 802. As such, forfeiture extends to a defendant's "entire interest in the enterprise." *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987).

The determination of the amount of profits and proceeds of the racketeering activity cannot be precise. Courts, however, have concluded gross profits are at least one acceptable measure of proceeds. *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 (1986). Although this method poses potential difficulties in dividing moneys derived from the enterprise from those obtained independently, this concern alone will not undermine use of the gross profits figure.

Forfeiture under RICO is a punitive, not a restitutive, measure. Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative. RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO's object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain.

Lizza Industries, Inc., 775 F.2d at 498.

As discussed, the identity of the seized proceeds is not crucial. Rather, the important element is the *amount* received through the pattern of racketeering activity. *United States v. Connor*, 752 F.2d 566, 576 (11th Cir.), *cert. denied sub nom Taylor v. United States*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985) (emphasis original). Since the parties have stipulated to a court resolution of this issue, the jury's verdict is only one factor the Court may consider in determining forfeitability. But the Court notes that the appropriate nexus between the proceeds and the illegal activity may be demonstrated by the jury's verdict of guilt, particularly if the proceeds are addressed in the indictment. *Id.* at 577. In addition, the Court may consider all the evidence in the case, even circumstantial evidence, to determine the amount to be forfeited and the connection between the racketeering activities and the proceeds.⁴ *Vogt*, 713 F.Supp. at 866-67.

⁴ In many respects, the RICO forfeiture at issue is similar to forfeitures pursuant to 21 U.S.C. §881. Under section 881, if the government is able to demonstrate property is used in any manner to facilitate the sale of narcotics, the property is subject to forfeiture. *One Blue 1977 AMC Jeep v. United States*, 783 F.2d 759, 761 (8th Cir. 1986). Forfeiture is appropriate no matter how small the quantity of drugs, *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989), or how little of the property is used to distribute. *United States v. Tax Lot 1500*, 861 F.2d 232, 235 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 364, 107 L.Ed.2d 351 (1989); *United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988); *United States v. Certain Real Property in Auburn, Maine*, 711 F.Supp. 660, 663 (D.Me. 1989); *United States v. Twelve Thousand Five Hundred Eighty Five Dollars*, 669 F.Supp. 939, 942 (D.Minn. 1987). While the forfeiture proceeding pursuant to 21 U.S.C. §881 is civil and *in rem*, its wide use and acceptance supports implementation of similar RICO measures.

Large scale forfeiture is entirely consistent with the provisions and purposes of RICO. This Court has previously commented upon the harsh punishment Congress clearly intended to impose under RICO. *Alexander*, mem. op. at 27-29 (D.Minn. January 24, 1990); *Ginsburg*, 773 F.2d at 802. The statute is intended to be given a broad reading and liberal interpretation. *Ginsburg*, 773 F.2d at 802. In keeping with this general approach to implementing RICO, a punishment for a RICO violation should be proportional to the racketeering crime. *Lizza Industries, Inc.*, 775 F.2d at 498; *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 444 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). A RICO forfeiture penalty "is keyed to the magnitude of a defendant's criminal enterprise." *Lizza Industries, Inc.*, 775 F.2d at 498.

These bank accounts, these traceable funds, and the eight million dollar figure were all contained in the indictment. The proceeds clearly supported the RICO scheme by providing the means and methods of transporting and selling obscene materials. Underlying those materials which the jury found obscene is that vast support system which made their existence and sale in this state possible.

In enacting RICO, and in granting its large penal power, Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch. Mere forfeiture of the dollars obtained from an isolated criminal event would make this goal a mockery. These bank accounts and proceeds financed distribution of obscene materials. The money was acquired by investing in defendant's illegal enterprises. There is no doubt these funds are substantial. Yet, the evidence demonstrates beyond a

reasonable doubt the sum sought to be forfeit is not beyond the scope of the enterprise proven.

Defendant has vigorously and often contended the funds should be protected in light of the first amendment. It is clear that some of the proceeds were obtained in the sale and distribution of protected materials. But the proceeds were inextricably tied to an enormous racketeering enterprise, and their connection to arguably protected speech will not save them from the reach of RICO forfeiture. Given the nexus between the accounts and the proceeds, the Court approves and grants the government's request for forfeiture of these items.

II. Costs of Prosecution

The government seeks reimbursement, in the amount of \$29,737.84, for its costs of prosecution. The government suggests \$16,536.24 of this amount must be assessed pursuant to the mandatory language of 26 U.S.C. §7206(5). In any case, the government contends the entire amount is recoverable, pursuant to 28 U.S.C. §1918(b) and 1920. Section 1918(b) provides "[w]henver any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution." 28 U.S.C. §1918(b). Section 1920 permits this Court to impose various fees and costs of administration.

The language regarding mandatory imposition of costs, pursuant to 26 U.S.C. §7206(5), is identical to the language of 26 U.S.C. §7203. The Eighth Circuit has specifically held a district court has no discretion in imposing the costs of prosecution pursuant to section 7203. *United States v. Wyman*, 724 F.2d 684, 688 (8th Cir. 1984). The

costs are mandatory. *Id.* The identical language of section 7206(5) mandates a similar holding in this instance. See *United States v. Fowler*, 794 F.2d 1446, 1450 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 157 (1987). As such, defendant is ordered to reimburse the costs of prosecution on the tax counts. This sum totals \$16,536.24. See *United States v. Palmer*, 809 F.2d 1504, 1506-08 (11th Cir. 1987); *United States v. Snowadzki*, 723 F.2d 1427, 1431 (9th Cir.), *cert. denied*, 469 U.S. 839, 105 S.Ct. 140, 83 L.Ed.2d 80 (1984); *United States v. Troiani*, 595 F.Supp. 186, 187 (N.D.Ill. 1984).

Imposition of costs pursuant to 28 U.S.C. §§1918 and 1920 is entirely within this Court's discretion. *United States v. Hiland*, No. 89-1222, slip op. at 51 (8th Cir. July 19, 1990); *United States v. Burchinal*, 657 F.2d 985, 997-98 (8th Cir.), *cert. denied*, 454 U.S. 1086, 102 S.Ct. 646, 70 L.Ed.2d 622 (1981). the Court, however, may not assess costs associated with those counts upon which defendant was acquitted or counts concerning co-defendants. *Hiland*, slip op. at 51. Costs of prosecution are entirely appropriate in a case involving obscenity charges. *United States v. American Theater Corp.*, 526 F.2d 48, 50-51 (8th Cir. 1975), *cert. denied*, 430 U.S. 938, 97 S.Ct. 1569, 51 L.Ed.2d 786 (1977).

The Court concludes costs of prosecution should be assessed for this entire prosecution. The scope of defendant's criminal involvement, particularly the tax conspiracy and racketeering activities, required extensive investigation and preparation on the part of the government. Given the dollar figures associated with defendant's tax and RICO crimes, justice will be served by requiring defendant, rather than the taxpayers at large, to

pay for the costs of prosecution. Defendant created his criminal empire and now must pay for its destruction. The \$29,737.84 cost of prosecution is, therefore, recoverable pursuant to 28 U.S.C. §§1918 and 1920.

Accordingly, IT IS ORDERED that:

1. Defendant hereby forfeits the property and proceeds considered in this order and specifically delineated in this Court's accompanying forfeiture order and judgment, dated August 6, 1990.

2. Defendant shall pay to the United States the sum of \$29,737.84 as the costs of prosecution.

Dated: August 10, 1990

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX D

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5417MNM

United States of America,	*	
Appellee,	*	
vs.	*	Order Denying
Ferris Jacob Alexander, Sr.,	*	Petition for
a/k/a Pete Saba, Peter Saba,	*	Rehearing and
Paul Saba, John Thomas, Bob	*	Suggestion for
Olson, Jim Nelson, Jim	*	Rehearing En Banc
Peterson, James Peterson,	*	
Robert Carlson, Frank Netti,	*	
Appellant.	*	

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

October 30, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX E

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UNITED STATES CODE

18 U.S.C.A. § 1465 (West Supp. 1991)

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

18 U.S.C.A. § 1466 (West Supp. 1991)

"(a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other

audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than five years or by a fine under this title, or both.

"(b) As used in this section, the term 'engaged on the business' means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is 'engaged in the business' as defined in this subsection."

18 U.S.C.A. § 1961 (West Supp. 1991)

"As used in this chapter -

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 1461-1465 (relating to obscene matter)"

18 U.S.C.A. § 1962 (West 1984 and Supp. 1991)

"(a) It shall be unlawful for any person who has received any income derived, directly or

indirectly, from a pattern or racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

18 U.S.C.A. § 1963 (West Supp. 1991)

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years . . . , or both, and shall forfeit to the United States, irrespective of any provision of State law -

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any -

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. . . . "
